

# *The* **NORTH CAROLINA REGISTER**

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## **INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE**

### **NORTH CAROLINA REGISTER**

The *North Carolina Register* is published twice a month and contains information relating to agency, executive, legislative and judicial actions required by or affecting Chapter 150B of the General Statutes. All proposed administrative rules and notices of public hearings filed under G.S. 150B-21.2 must be published in the Register. The Register will typically comprise approximately fifty pages per issue of legal text.

State law requires that a copy of each issue be provided free of charge to each county in the state and to various state officials and institutions.

The *North Carolina Register* is available by yearly subscription at a cost of one hundred and five dollars (\$105.00) for 24 issues. Individual issues may be purchased for eight dollars (\$8.00).

Requests for subscription to the North Carolina Register should be directed to the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, N. C. 27611-7447.

### **ADOPTION AMENDMENT, AND REPEAL OF RULES**

The following is a generalized statement of the procedures to be followed for an agency to adopt, amend, or repeal a rule. For the specific statutory authority, please consult Article 2A of Chapter 150B of the General Statutes.

Any agency intending to adopt, amend, or repeal a rule must first publish notice of the proposed action in the *North Carolina Register*. The notice must include the time and place of the public hearing (or instructions on how a member of the public may request a hearing); a statement of procedure for public comments; the text of the proposed rule or the statement of subject matter; the reason for the proposed action; a reference to the statutory authority for the action and the proposed effective date.

Unless a specific statute provides otherwise, at least 15 days must elapse following publication of the notice in the *North Carolina Register* before the agency may conduct the public hearing and at least 30 days must elapse before the agency can take action on the proposed rule. An agency may not adopt a rule that differs substantially from the proposed form published as part of the public notice, until the adopted version has been published in the *North Carolina Register* for an additional 30 day comment period.

When final action is taken, the promulgating agency must file the rule with the Rules Review Commission (RRC). After approval by RRC, the adopted rule is filed with the Office of Administrative Hearings (OAH).

A rule or amended rule generally becomes effective 5 business days after the rule is filed with the Office of Administrative Hearings for publication in the North Carolina Administrative Code (NCAC).

Proposed action on rules may be withdrawn by the promulgating agency at any time before final action is taken by the agency or before filing with OAH for publication in the NCAC.

### **TEMPORARY RULES**

Under certain emergency conditions, agencies may issue temporary rules. Within 24 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the temporary rule pursuant to the provisions in G.S. 150B-21.1. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1, the rule is entered into the NCAC. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement its findings and resubmit the temporary rule for an additional review or the agency may respond that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC. A temporary rule becomes effective either when the Codifier of Rules enters the rule in the Code or on the sixth business day after the agency resubmits the rule without change. The temporary rule is in effect for the period specified in the rule or 180 days, whichever is less. An agency adopting a temporary rule must begin rule-making procedures on the permanent rule at the same time the temporary rule is filed with the Codifier.

### **NORTH CAROLINA ADMINISTRATIVE CODE**

The North Carolina Administrative Code (NCAC) is a compilation and index of the administrative rules of 25 state agencies and 38 occupational licensing boards. The NCAC comprises approximately 15,000 letter size, single spaced pages of material of which approximately 35% of is changed annually. Compilation and publication of the NCAC is mandated by G.S. 150B-21.18.

The Code is divided into Titles and Chapters. Each state agency is assigned a separate title which is further broken down by chapters. Title 21 is designated for occupational licensing boards.

The NCAC is available in two formats.

- (1) Single pages may be obtained at a minimum cost of two dollars and 50 cents (\$2.50) for 10 pages or less, plus fifteen cents (\$0.15) per each additional page.
- (2) The full publication consists of 53 volumes, totaling in excess of 15,000 pages. It is supplemented monthly with replacement pages. A one year subscription to the full publication including supplements can be purchased for seven hundred and fifty dollars (\$750.00). Individual volumes may also be purchased with supplement service. Renewal subscriptions for supplements to the initial publication are available.

Requests for pages of rules or volumes of the NCAC should be directed to the Office of Administrative Hearings.

### **CITATION TO THE NORTH CAROLINA REGISTER**

The *North Carolina Register* is cited by volume, issue, page number and date. 1:1 NCR 101-201, April 1, 1986 refers to Volume 1, Issue 1, pages 101 through 201 of the *North Carolina Register* issued on April 1, 1986.

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# **NORTH CAROLINA REGISTER**



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**NORTH CAROLINA REGISTER**  
***Publication Schedule***  
*(August 1992 - December 1993)*

Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing	Earliest Date for Adoption by Agency	Last Day to Submit to RRC	*Earliest Effective Date
*****	*****	*****	*****	*****	*****	*****
08/03/92	07/13/92	07/20/92	08/18/92	09/02/92	09/20/92	11/02/92
08/14/92	07/24/92	07/31/92	08/29/92	09/13/92	09/20/92	11/02/92
09/01/92	08/11/92	08/18/92	09/16/92	10/01/92	10/20/92	12/01/92
09/15/92	08/25/92	09/01/92	09/30/92	10/15/92	10/20/92	12/01/92
10/01/92	09/10/92	09/17/92	10/16/92	10/31/92	11/20/92	01/04/93
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09/01/93	08/11/93	08/18/93	09/16/93	10/01/93	10/20/93	12/01/93
09/15/93	08/24/93	08/31/93	09/30/93	10/15/93	10/20/93	12/01/93
10/01/93	09/10/93	09/17/93	10/16/93	10/31/93	11/20/93	01/04/94
10/15/93	09/24/93	10/01/93	10/30/93	11/14/93	11/20/93	01/04/94
11/01/93	10/11/93	10/18/93	11/16/93	12/01/93	12/20/93	02/01/94
11/15/93	10/22/93	10/29/93	11/30/93	12/15/93	12/20/93	02/01/94
12/01/93	11/05/93	11/15/93	12/16/93	12/31/93	01/20/94	03/01/94
12/15/93	11/24/93	12/01/93	12/30/93	01/14/94	01/20/94	03/01/94

\* The "Earliest Effective Date" is computed assuming that the agency follows the publication schedule above, that the Rules Review Commission approves the rule at the next calendar month meeting after submission, and that RRC delivers the rule to the Codifier of Rules five (5) business days before the 1st business day of the next calendar month.

## CHAPTER 150B

### THE ADMINISTRATIVE PROCEDURE ACT

[The following excerpt contains the statutory provisions of the Administrative Procedure Act as amended by the 1991 General Assembly, Second Session effective July 1, 1992.]

#### Article 1.

##### General Provisions.

###### § 150B-1. Policy and scope.

(a) Purpose. -- This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

(b) Rights. -- This Chapter confers procedural rights.

(c) Full Exemptions. -- This Chapter applies to every agency except:

- (1) The North Carolina National Guard in exercising its court-martial jurisdiction.
- (2) The Department of Human Resources in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes.
- (3) The Utilities Commission.
- (4) The Industrial Commission.
- (5) The Employment Security Commission.

(d) Exemptions From Rule Making. -- Article 2A of this Chapter does not apply to the following:

- (1) The Commission.
- (2) The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-10 and G.S. 104G-11.
- (3) The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-13 and G.S. 130B-14.
- (4) The Department of Revenue, except that Parts 3 and 4 of Article 2A apply to the Department.
- (5) The North Carolina Air Cargo Airport Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.

(e) Exemptions From Contested Case Provisions. -- The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The

contested case provisions of this Chapter do not apply to the following:

- (1) The Department of Human Resources and the Department of Environment, Health, and Natural Resources in complying with the procedural safeguards mandated by Section 680 of Part H of Public Law 99-457 as amended (Education of the Handicapped Act Amendments of 1986).
- (2) The Governor's Waste Management Board in administering the provisions of G.S. 104E-6.2 and G.S. 130A-293.
- (3) The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-9, 104G-10, and 104G-11.
- (4) The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-11, 130B-13, and 130B-14.
- (5) Hearings required pursuant to the Rehabilitation Act of 1973, (Public Law 93-122), as amended and federal regulations promulgated thereunder. G.S. 150B-51(a) is considered a contested case hearing provision that does not apply to these hearings.
- (6) The Department of Revenue.
- (7) The Department of Correction.
- (8) The Department of Transportation, except as provided in G.S. 136-29.
- (9) The Occupational Safety and Health Review Board in all actions that do not involve agricultural employers.
- (10) The North Carolina Air Cargo Airport Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.

(f) Exemption From All But Judicial Review. -- No Article in this Chapter except Article 4 applies to the University of North Carolina.

###### § 150B-2. Definitions. -- As used in this Chapter,

- (1) "Administrative law judge" means a person appointed under G.S. 7A-752,

(1) 7A-753, or 7A-757.

(1) "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

(1a) "Adopt" means to take final action to create, amend, or repeal a rule.

(1b) "Codifier of Rules" means the Chief Administrative Law Judge of the Office of Administrative Hearings or a designated representative of the Chief Administrative Law Judge.

(1c) "Commission" means the Rules Review Commission.

(2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship or grant.

(2a) Repealed.

(2b) "Hearing officer" means a person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.

(3) "License" means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes and occupational licenses.

(4) "Licensing" means any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. "Licensing" does not include controversies over whether an examination was fair or whether the applicant passed the examination.

(4a) "Occupational license" means any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.

(4b) "Occupational licensing agency" means any board, commission, committee or other agency of the State of North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within a particular profession, occupation or field of endeavor, and which is authorized to issue and revoke licenses. "Occupational licensing agency" does not include State agencies or departments which may as only a part of their regular function issue permits or licenses.

(5) "Party" means any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate. This subdivision does not permit an agency that makes a final decision, or an officer or employee of the agency, to petition for initial judicial review of that decision.

(6) "Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.

(7) "Person" means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name.

(8) "Residence" means domicile or principal place of business.

(8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143-11 or 143B-6, including policies and

- procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
- b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.
- c. Nonbinding interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
- d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
- e. Statements of agency policy made in the context of another proceeding, including:
  1. Declaratory rulings under G.S. 150B-4.
  2. Orders establishing or fixing rates or tariffs.
- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
- g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
- h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.
- j. Establishment of the interest rate that applies to tax assessments

under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-434.

(8b) "Substantial evidence" means relevant evidence a reasonable mind might accept as adequate to support a conclusion.

(9) Repealed.

**§ 150B-3. Special provisions on licensing.**

(a) When an applicant or a licensee makes a timely and sufficient application for issuance or renewal of a license or occupational license, including the payment of any required license fee, the existing license or occupational license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license or occupational license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending a license or occupational license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license other than an occupational license, the agency shall give notice to the licensee, pursuant to the provisions of G.S. 150B-23. Before the commencement of such proceedings involving an occupational license, the agency shall give notice pursuant to the provisions of G.S. 150B-38. In either case, the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license or occupational license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license.

**§ 150B-4. Declaratory rulings.**

(a) On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of

facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

(b) This section does not apply to the Department of Correction.

Article 2.

Rule Making.  
Repealed.

Article 2A.

Rules.

Part 1. General Provisions.

**§ 150B-18. Scope and effect.**

This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article.

**§ 150B-19. Restrictions on what can be adopted as a rule.**

An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation.
- (5) Establishes a reasonable fee or other reasonable charge for providing a service in fulfillment of a duty unless a

law specifically authorizes the agency to do so or the fee or other charge is for one of the following:

- a. A service to a State, federal, or local governmental unit.
- b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
- c. A transcript of a public hearing.
- d. A conference, workshop, or course.
- e. Data processing services.

(6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.

**§ 150B-20. Petitioning an agency to adopt a rule.**

(a) Petition. -- A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(b) Time. -- An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) Action. -- If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition requesting the creation or amendment of a rule, the notice of rule making it publishes in the North Carolina Register may state that the agency is initiating rule-making proceedings as the result of a rule-making petition, state the name of the person who submitted the rule-making petition, set out the text of the requested rule change submitted with the rule-making petition, and state whether the agency endorses the proposed rule change.

(d) Review. -- Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Exception. -- This section does not apply to the Department of Correction.

**§ 150B-21. Agency must designate rule-making coordinator.**

Each agency must designate one or more rule-making coordinators to oversee the agency's rule-making functions. The coordinator must prepare notices of public hearings, coordinate access to the agency's rules, and serve as the liaison between the agency, other agencies, and the public in the rule-making process.

Part 2. Adoption of Rules.

**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. -- An agency may adopt a temporary rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A federal regulation.
- (5) A court order.
- (6) The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

An agency must prepare a written statement of its findings of need for a temporary rule. The statement must be signed by the head of the agency adopting the rule.

An agency must begin rule-making proceedings for a permanent rule by the day it adopts a temporary rule. An agency begins rule-making proceedings for a permanent rule by submitting to the codifier written notice of its intent to adopt a permanent rule.

(b) Review. -- When an agency adopts a temporary rule it must submit the rule, the agency's

written statement of its findings of need for the rule, and the notice of intent to adopt a permanent rule to the Codifier of Rules. Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a). In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.

If the Codifier of Rules finds that the statement does not meet the criteria, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria listed in subsection (a), the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.

(c) Standing. -- A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) and whether the rule meets the standards in G.S. 150B-21.9 that apply to review of a permanent rule. The court may not grant an *ex parte* temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the

Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. -- A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the date specified in the rule or 180 days from the date the rule becomes effective, whichever comes first.

**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Notice. -- Before an agency adopts a permanent rule, it must publish notice of its intent to adopt a permanent rule in the North Carolina Register and as required by any other law. The notice published in the North Carolina Register must include all of the following:

- (1) Either the text of the proposed rule or a statement of the subject matter of the proposed rule making.
- (2) A short explanation of the reason for the proposed action.
- (3) A citation to the law that gives the agency the authority to adopt the proposed rule, if the notice includes the text of the proposed rule, or a citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making, if the notice includes only a statement of the subject matter of the proposed rule making.
- (4) The proposed effective date of the proposed rule, if the notice includes the text of the proposed rule, or the proposed effective date of a rule adopted on the subject matter of the proposed rule making, if the notice includes only a statement of the subject matter of the proposed rule making.
- (5) The date, time, and place of any public hearing scheduled on the proposed rule or subject matter of the proposed rule making.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (c) requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The period of time during which and the person to whom written comments may be submitted on the proposed rule or subject matter of the proposed rule making.
- (8) If a fiscal note has been prepared for the proposed rule or will be prepared

when a rule is proposed on the subject matter of the proposed rule making, a statement that a copy of the fiscal note can be obtained from the agency.

(b) Mailing List. -- An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes a rule-making notice in the North Carolina Register, it must mail a copy of the notice to each person on the mailing list who has requested notice of rule-making proceedings on the rule or the subject matter for rule making described in the notice. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(c) Hearing. -- An agency must hold a public hearing on a rule it proposes to adopt in two circumstances and may hold a public hearing in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published.

An agency must hold a public hearing on a rule it proposes to adopt in the following two circumstances:

- (1) The agency publishes a statement of the subject matter of the proposed rule making in the notice in the North Carolina Register.
- (2) The agency publishes the text of the proposed rule in the notice in the North Carolina Register and all the following apply:
  - a. The notice does not schedule a public hearing on the proposed rule.
  - b. Within 15 days after the notice is published, the agency receives a written request for a public hearing on the proposed rule.
  - c. The proposed rule is not part of a rule-making proceeding the agency initiated by publishing a statement of the subject matter of proposed rule making.
  - d. The proposed text is not a changed version of proposed text the agency previously published in the course of rule-making proceedings but did not adopt.

(d) Text After Subject-Matter Notice. -- When an agency publishes notice of the subject matter of proposed rule making in the North Carolina Register, it must subsequently publish in the North Carolina Register the text of the rule it proposes to adopt as a result of the public hearing and of any comments received on the subject matter. An agency may not publish the proposed text of a rule for which it published a subject-matter notice before the public hearing on the subject matter.

(e) Comments. -- An agency must accept comments on the text of a proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must accept comments on a statement of the subject matter of proposed rule making until the public hearing on the subject matter. An agency must consider fully all written and oral comments received.

(f) Adoption. -- An agency may not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and may not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency may not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (e).

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the notice published in the North Carolina Register or the proposed text of the rule, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it may not take subsequent action on the rule without following the procedures in this Part.

(g) Explanation. -- An agency must issue a concise written statement explaining why the agency adopted a rule if, within 30 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal

reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule.

(h) Record. -- An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, and any written explanation made by the agency for adopting the rule.

**§ 150B-21.3. Effective date of rules.**

(a) Temporary Rule. -- A temporary rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. -- A permanent rule approved by the Commission becomes effective five business days after the Commission delivers the rule to the Codifier of Rules, unless the agency adopting the rule specifies a later effective date. If the agency specifies a later effective date, the rule becomes effective on that date.

A permanent rule that is not approved by the Commission becomes effective five business days after the agency adopting the rule delivers the rule to the Codifier of Rules, unless the agency adopting the rule specifies a later effective date. If the agency specifies a later effective date, the rule becomes effective on that date.

(c) OSHA Standard. -- A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

**§ 150B-21.4. Fiscal notes on rules.**

(a) State Funds. -- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the Executive Budget Act, Article 1 of Chapter 143, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Director of the Budget and obtain certification from the Director that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed. The Director of the Budget must

certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

(b) Local Funds. -- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Fiscal Research Division of the General Assembly, the Office of State Budget and Management, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities. The fiscal note must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.

(c) Errors. -- An erroneous fiscal note prepared in good faith does not affect the validity of a rule.

**§ 150B-21.5. Circumstances when notice and rule-making hearing not required.**

(a) Amendment. -- An agency is not required to publish a notice of rule making in the North Carolina Register or hold a public hearing when it proposes to amend a rule, without changing the substance of the rule, to do one of the following:

- (1) Reletter or renumber the rule or subparts of the rule.
- (2) Substitute one name for another when an organization or position is renamed.
- (3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
- (4) Change information that is readily available to the public, such as an address or a telephone number.
- (5) Correct a typographical error made in entering the rule in the North Carolina Administrative Code.
- (6) Change a rule in response to a request or an objection by the Commission.

(b) Repeal. -- An agency is not required to publish a notice of rule making in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

- (1) The law under which the rule was adopted is repealed.
- (2) The law under which the rule was adopted or the rule itself is declared unconstitutional.
- (3) The rule is declared to be in excess of

the agency's statutory authority.

(c) OSHA Standard. -- The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of rule making in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

**§ 150B-21.6. Incorporating material in a rule by reference.**

An agency may incorporate the following material by reference in a rule without repeating the text of the referenced material:

- (1) Another rule or part of a rule adopted by the agency.
- (2) All or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.
- (3) Material adopted to meet a requirement of the federal government.

In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.

A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(b) is a statement that the rule does not include subsequent amendments and editions of the referenced material. A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(c) is a statement that the rule includes subsequent amendments and editions of the referenced material.

**§ 150B-21.7. Effect of transfer of duties or termination of agency on rules.**

When a law that authorizes an agency to adopt a rule is repealed and another law gives the same or another agency substantially the same authority to adopt a rule, the rule remains in effect until the agency amends or repeals the rule. When a law that authorizes an agency to adopt a rule is repealed and another law does not give the same or

another agency substantially the same authority to adopt a rule, a rule adopted under the repealed law is repealed as of the date the law is repealed.

When an executive order abolishes part or all of an agency and transfers a function of that agency to another agency, a rule concerning the transferred function remains in effect until the agency to which the function is transferred amends or repeals the rule. When an executive order abolishes part or all of an agency and does not transfer a function of that agency to another agency, a rule concerning a function abolished by the executive order is repealed as of the effective date of the executive order.

The Director of Fiscal Research of the General Assembly must notify the Codifier of Rules when a rule is repealed under this section. When notified of a rule repealed under this section, the Codifier of Rules must enter the repeal of the rule in the North Carolina Administrative Code.

Part 3. Review by Commission.

**§ 150B-21.8. Review of rule by Commission.**

(a) **Temporary Rule.** -- The Commission does not review a temporary rule.

(b) **Permanent Rule.** -- An agency must submit a permanent rule adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a permanent rule.

(c) **Scope.** -- When the Commission reviews an amendment to a rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a rule that is within its scope of review but is not changed by a rule amendment.

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) **Standards.** -- The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly.

The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article. The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency.

Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 of this Article.

(b) **Timetable.** -- The Commission must review a rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month.

**§ 150B-21.10. Commission action on permanent rule.**

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes.

**§ 150B-21.11. Procedure when Commission approves permanent rule.**

When the Commission approves a permanent rule, it must notify the agency that adopted the rule of the Commission's approval and must deliver the approved rule to the Codifier of Rules. The Commission must deliver an approved rule by the end of the month in which the Commission approved the rule, unless the agency asks the Commission to delay the delivery of the rule.

**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) **Action.** -- When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

An agency that is not a board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection.

A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it may send to the President of the Senate and each member of the General Assembly a report of its objection to the rule.

(b) Entry in Code. -- When the Commission returns a rule to which it has objected to the agency that adopted the rule, the Commission must notify the Codifier of Rules of its action and of the basis of the Commission's objection. An agency whose rule is returned may file the rule with the Codifier of Rules. When the Codifier of Rules enters in the North Carolina Administrative Code a rule to which the Commission objected, the entry must reflect the Commission's objection and must state the standard on which the Commission based its objection.

**§ 150B-21.13. Procedure when Commission extends period for review of permanent rule.**

When the Commission extends the period for review of a permanent rule, it must notify the agency that adopted the rule of the extension and the reason for the extension. After the Commission extends the period for review of a rule, it may call a public hearing on the rule. Within 70 days after extending the period for review of a rule, the Commission must decide whether to approve the rule, object to the rule, or call a public hearing on the rule.

**§ 150B-21.14. Public hearing on a rule.**

The Commission may call a public hearing on a rule when it extends the period for review of the rule. At the request of an agency, the Commission may call a public hearing on a rule that is not before it for review. Calling a public hearing on

a rule not already before the Commission for review places the rule before the Commission for review. When the Commission decides to call a public hearing on a rule, it must publish notice of the public hearing in the North Carolina Register.

After a public hearing on a rule, the Commission must approve the rule or object to the rule in accordance with the standards and procedures in this Part. The Commission must make its decision of whether to approve or object to the rule within 70 days after the public hearing.

**§ 150B-21.15. Declaratory judgment action authorized when Commission objects to a permanent rule.**

(a) Standing. -- A person aggrieved by a permanent rule entered in the North Carolina Administrative Code with an objection by the Commission based on a lack of statutory authority may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency exceeded its authority in adopting the rule.

A declaratory judgment action under this section must be filed within 90 days after the rule that is the subject of the action is entered in the Code. Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this section. A person who files an action for declaratory judgment under this section must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(b) Record. -- Within 10 days after a declaratory judgment action is filed under this section, the agency that adopted the rule that is the subject of the action must send to the court the original or a certified copy of the record in the Commission's review of the rule. The record consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

(c) Effect. -- A rule remains in effect during the pendency of an action for declaratory judgment under this section unless the court suspends the rule after finding that the agency that adopted the rule has no substantial likelihood of prevailing in the action.

(d) Changes. -- While a rule is the subject of a declaratory judgment action under this section, the agency that adopted the rule may submit to the Commission changes in the rule to satisfy the

Commission's objection. If the Commission determines that changes submitted to it satisfy its objection, the Commission must accept the changes and file the revised rule with the Codifier of Rules. The Codifier must then enter the rule in the North Carolina Administrative Code. When the Commission determines that changes submitted to it satisfy its objection, the agency that submitted the changes must notify the court of the changes and of the Commission's action.

**Part 4. Publication of Code and Register.**

**§ 150B-21.17. North Carolina Register.**

(a) Content. -- The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

- (1) Notices of proposed adoptions of rules.
- (2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.
- (3) Executive orders of the Governor.
- (4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to § 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.
- (5) Orders of the Tax Review Board issued under G.S. 105-241.2.
- (6) Other information the Codifier determines helpful to the public.

(b) Form. -- When an agency publishes notice in the North Carolina Register of the proposed text of a new rule, the Codifier of Rules must publish the complete text of the proposed new rule. In publishing the text of a proposed new rule, the Codifier must indicate the rule is new by underlining the proposed text of the rule.

When an agency publishes notice in the North Carolina Register of the proposed text of an amendment to an existing rule, the Codifier must publish the complete text of the rule that is being amended unless the Codifier determines that publication of the complete text of the rule being amended is not necessary to enable the reader to understand the proposed amendment. In publishing the text of a proposed amendment to a rule, the Codifier must indicate deleted text with overstrikes and added text with underlines.

When an agency publishes notice in the North Carolina Register of the proposed repeal of an existing rule, the Codifier must publish the complete text of the rule the agency proposes to repeal unless the Codifier determines that publication of the complete text is impractical. In publishing the

text of a rule the agency proposes to repeal, the Codifier must indicate the rule is to be repealed.

**§ 150B-21.18. North Carolina Administrative Code.**

The Codifier of Rules must compile all rules into a Code known as the North Carolina Administrative Code. The format and indexing of the Code must conform as nearly as practical to the format and indexing of the North Carolina General Statutes. The Codifier must publish printed copies of the Code and may publish the Code in other forms. The Codifier must keep the Code current by publishing the Code in a loose-leaf format and periodically providing new pages to be substituted for outdated pages, by publishing the Code in volumes and periodically publishing cumulative supplements, or by another means. The Codifier must keep superseded rules.

**§ 150B-21.19. Requirements for including rule in Code.**

To be acceptable for inclusion in the North Carolina Administrative Code, a rule must:

- (1) Cite the law under which the rule is adopted.
- (2) Be signed by the head of the agency or the rule-making coordinator for the agency that adopted the rule.
- (3) Be in the physical form specified by the Codifier of Rules.
- (4) Have been reviewed by the Commission, if the rule is a permanent rule.

**§ 150B-21.20. Codifier's authority to revise form of rules.**

(a) Authority. -- After consulting with the agency that adopted the rule, the Codifier of Rules may revise the form of a rule submitted for inclusion in the North Carolina Administrative Code within 10 business days after the rule is submitted to do one or more of the following:

- (1) Rearrange the order of the rule in the Code or the order of the subsections, subdivisions, or other subparts of the rule.
- (2) Provide a catch line or heading for the rule or revise the catch line or heading of the rule.
- (3) Reletter or renumber the rule or the subparts of the rule in accordance with a uniform system.
- (4) Rearrange definitions and lists.
- (5) Make other changes in arrangement or in form that do not change the substance of the rule and are necessary or desirable for a clear and orderly arrangement of the rule.

(b) Effect. -- Revision of a rule by the Codifier of Rules under this section does not affect the effective date of the rule or require the agency to readopt or resubmit the rule. When the Codifier of Rules revises the form of a rule, the Codifier of Rules must send the agency that adopted the rule a copy of the revised rule. The revised rule is the official rule.

**§ 150B-21.21. Publication of rules of North Carolina State Bar and exempt agencies.**

(a) State Bar. -- The North Carolina State Bar must submit a rule adopted or approved by it and entered in the minutes of the North Carolina Supreme Court to the Codifier of Rules for inclusion in the North Carolina Administrative Code. The State Bar must submit a rule within 15 days after it is entered in the minutes of the Supreme Court. The Codifier of Rules must compile, make available for public inspection, and publish a rule included in the North Carolina Administrative Code under this subsection in the same manner as other rules in the Code.

(b) Exempt Agencies. -- Notwithstanding G.S. 150B-1, the North Carolina Utilities Commission must submit to the Codifier of Rules those rules of the Utilities Commission that are published from time to time in the publication titled "North Carolina Utilities Laws and Regulations." The Utilities Commission must submit a rule required to be included in the Code within 15 days after it is adopted. The Codifier of Rules must publish the rules submitted by the Utilities Commission in the North Carolina Administrative Code in the same format as they are submitted.

Notwithstanding G.S. 150B-1, an agency other than the Utilities Commission that is exempted from this Article by that statute must submit a temporary or permanent rule adopted by it to the Codifier of Rules for inclusion in the North Carolina Administrative Code. One of these exempt agencies must submit a rule to the Codifier of Rules within 15 days after it adopts the rule. The Codifier of Rules must compile, make available for public inspection, and publish a rule of one of these agencies in the North Carolina Administrative Code in the same manner as other rules in the Code.

**§ 150B-21.22. Effect of inclusion in Code.**

Official or judicial notice can be taken of a rule in the North Carolina Administrative Code and shall be taken when appropriate. Codification of a rule in the North Carolina Administrative Code is **prima facie** evidence of compliance with this Article.

**§ 150B-21.23. Rule publication manual.**

The Codifier of Rules must publish a manual that sets out the form and method for publishing a notice of rule making in the North Carolina Register and for filing a rule in the North Carolina Administrative Code.

**§ 150B-21.24. Free copies of Register and Code.**

(a) Register. -- The Codifier of Rules must distribute copies of the North Carolina Register as soon after publication as practical, without charge, to the following:

(1) A person who receives a free copy of the North Carolina Administrative Code.

(2) Upon request, one copy to each member of the General Assembly.

(b) Code. -- The Codifier of Rules must distribute copies of the North Carolina Administrative Code as soon after publication as practical, without charge, to the following:

(1) One copy to the board of commissioners of each county, to be placed at the county clerk of court's office or at another place selected by the board of commissioners.

(2) One copy to the Commission.

(3) One copy to the Clerk of the Supreme Court and to the Clerk of the Court of Appeals of North Carolina.

(4) One copy to the Supreme Court Library and one copy to the library of the Court of Appeals.

(5) One copy to the Administrative Office of the Courts.

(6) One copy to the Governor.

(7) Five copies to the Legislative Services Commission for the use of the General Assembly.

(8) Upon request, one copy to each State official or department to whom or to which copies of the appellate division reports are furnished under G.S. 7A-343.1.

(9) Five copies to the Division of State Library of the Department of Cultural Resources pursuant to G.S. 125-11.7.

**§ 150B-21.25. Paid copies of Register and Code.**

A person who is not entitled to a free copy of the North Carolina Administrative Code or North Carolina Register may obtain a copy by paying a fee set by the Codifier of Rules. The Codifier must set separate fees for the North Carolina Register and the North Carolina Administrative Code in amounts that cover publication, copying,

and mailing costs. All monies received under this section must be credited to the General Fund.

Article 3.

Administrative Hearings.

**§ 150B-22. Settlement; contested case.**

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

**§ 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.**

(a) A contested case shall be commenced by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the Office of Administrative

Hearings in the same manner as other contested cases under this Article, except that the decision of the State Personnel Commission shall be advisory only and not binding on the local appointing authority, unless (1) the employee, applicant, or former employee has been subjected to discrimination prohibited by Article 6 of Chapter 126 of the General Statutes or (2) applicable federal standards require a binding decision. In these two cases, the State Personnel Commission's decision shall be binding.

(al) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(9).

(a2) An administrative law judge assigned to a contested case may require a party to the case to file a prehearing statement. A party's prehearing statement must be served on all other parties to the contested case.

(b) The parties to a contested case shall be given a notice of hearing not less than 15 days before the hearing by the Office of Administrative Hearings. If prehearing statements have been filed in the case, the notice shall state the date, hour, and place of the hearing. If prehearing statements have not been filed in the case, the notice shall state the date, hour, place, and nature of the hearing, shall list the particular sections of the statutes and rules involved, and shall give a short and plain statement of the factual allegations.

(c) Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall then be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) Any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24. In addition, any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.

(e) All hearings under this Chapter shall be open to the public. Hearings shall be conducted in an impartial manner. Hearings shall be conducted according to the procedures set out in this Article, except to the extent and in the particulars that specific hearing procedures and time standards are governed by another statute.

(f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time

limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

**§ 150B-24. Venue of hearing.**

(a) The hearing of a contested case shall be conducted:

- (1) In the county in this State in which any person whose property or rights are the subject matter of the hearing maintains his residence;
- (2) In the county where the agency maintains its principal office if the property or rights that are the subject matter of the hearing do not affect any person or if the subject matter of the hearing is the property or rights of residents of more than one county; or
- (3) In any county determined by the administrative law judge in his discretion to promote the ends of justice or better serve the convenience of witnesses.

(b) Any person whose property or rights are the subject matter of the hearing waives his objection to venue by proceeding in the hearing.

**§ 150B-25. Conduct of hearing; answer.**

(a) If a party fails to appear in a contested case after proper service of notice, and if no adjournment or continuance is granted, the administrative law judge may proceed with the hearing in the absence of the party.

(b) Repealed.

(c) The parties shall be given an opportunity to present arguments on issues of law and policy and an opportunity to present evidence on issues of fact.

(d) A party may cross-examine any witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. Any party may submit rebuttal evidence.

**§ 150B-26. Consolidation.**

When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending, the Director of the Office of Administrative Hearings may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

**§ 150B-27. Subpoena.**

After the commencement of a contested case, subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. In addition to the methods of service in G.S. 1A-1, Rule 45, a State law enforcement officer may serve a subpoena on behalf of an agency that is a party to the contested case by any method by which a sheriff may serve a subpoena under that Rule. Upon a motion, the administrative law judge may quash a subpoena if, upon a hearing, the administrative law judge finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

**§ 150B-28. Depositions and discovery.**

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in contested cases may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) On a request for identifiable agency records, with respect to material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall promptly make the records available to a party.

**§ 150B-29. Rules of evidence.**

(a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the

rules to show relevant facts, then the most reliable and substantial evidence available shall be admitted. On the judge's own motion, an administrative law judge may exclude evidence that is inadmissible under this section. It shall not be necessary for a party or his attorney to object at the hearing to evidence in order to preserve the right to object to its consideration by the administrative law judge in making a recommended decision, by the agency in making a final decision, or by the court on judicial review.

(b) Evidence in a contested case, including records and documents, shall be offered and made a part of the record. Factual information or evidence not made a part of the record shall not be considered in the determination of the case, except as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

**§ 150B-30. Official notice.**

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument.

**§ 150B-31. Stipulations.**

(a) The parties in a contested case may, by a stipulation in writing filed with the administrative law judge, agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable.

(b) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

**§ 150B-32. Designation of administrative law judge.**

(a) The Director of the Office of Administrative Hearings shall assign himself or another administrative law judge to preside over a contested case.

(al) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1 (15), effective July 15, 1986.

(b) On the filing in good faith by a party of a

timely and sufficient affidavit of personal bias or disqualification of an administrative law judge, the administrative law judge shall determine the matter as a part of the record in the case, and this determination shall be subject to judicial review at the conclusion of the proceeding.

(c) When an administrative law judge is disqualified or it is impracticable for him to continue the hearing, the Director shall assign another administrative law judge to continue with the case unless it is shown that substantial prejudice to any party will result, in which event a new hearing shall be held or the case dismissed without prejudice.

**§ 150B-33. Powers of administrative law judge.**

(a) An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

(b) An administrative law judge may:

- (1) Administer oaths and affirmations;
- (2) Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45;
- (3) Provide for the taking of testimony by deposition and rule on all objections to discovery in accordance with G.S. 1A-1, the Rules of Civil Procedure;
- (3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure;
- (4) Regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties;
- (6) Stay the contested action by the agency pending the outcome of the case, upon such terms as he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65;
- (7) Determine whether the hearing shall be recorded by a stenographer or by an

electronic device; and

(8) Enter an order returnable in the General Court of Justice, Superior Court Division, to show cause why the person should not be held in contempt. The Court shall have the power to impose punishment as for contempt for any act which would constitute direct or indirect contempt if the act occurred in an action pending in Superior Court.

(9) Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.

(10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.

**§ 150B-34. Recommended decision or order of administrative law judge.**

(a) Except as provided in G.S. 150B-36(c), in each contested case the administrative law judge shall make a recommended decision or order that contains findings of fact and conclusions of law.

(b) Repealed.

**§ 150B-35. No ex parte communication; exceptions.**

Unless required for disposition of an ex parte matter authorized by law, neither the administrative law judge assigned to a contested case nor a member or employee of the agency making a final decision in the case may communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate.

**§ 150B-36. Final decision.**

(a) Before the agency makes a final decision, it shall give each party an opportunity to file exceptions to the decision recommended by the administrative law judge, and to present written arguments to those in the agency who will make the final decision or order. If a party files in good faith a timely and sufficient affidavit of personal bias or other reason for disqualification of a member of the agency making the final decision, the agency shall determine the matter as a part of the record in the case, and the determination is subject to judicial review at the conclusion of the case.

(b) A final decision or order in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. If the agency does not adopt the administrative law judge's recommended decision as its final decision, the agency shall state in its decision or order the specific reasons why it did not adopt the administrative law judge's recommended decision. The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision or order, and the final decision or order shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. A copy of the decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency, and a copy shall be furnished to his attorney of record and the Office of Administrative Hearings.

(c) The following decisions made by administrative law judges in contested cases are final decisions:

- (1) A determination that the Office of Administrative Hearings lacks jurisdiction.
- (2) An order entered pursuant to the authority in G.S. 7A-759(e).
- (3) An order entered pursuant to a written prehearing motion that either dismisses the contested case for failure of the petitioner to prosecute or grants the relief requested when a party does not comply with procedural requirements.
- (4) An order entered pursuant to a prehearing motion to dismiss the contested case in accordance with G.S. 1A-1, Rule 12(b) when the order disposes of all issues in the contested case.

**§ 150B-37. Official record.**

(a) In a contested case, the Office of Administrative Hearings shall prepare an official record of the case that includes:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; and
- (5) Repealed by Session Laws 1987, c. 878, s. 25, effective August 14, 1987.
- (6) The administrative law judge's recom-

mended decision or order.

(b) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests, and said transcript or part thereof shall be added to the official record as an exhibit.

(c) The Office of Administrative Hearings shall forward a copy of the official record to the agency making the final decision and shall forward a copy of the recommended decision to each party.

Article 3A.

Other Administrative Hearings.

**§ 150B-38. Scope; hearing required; notice; venue.**

(a) The provisions of this Article shall apply to the following agencies:

- (1) Occupational licensing agencies;
- (2) The State Banking Commission, the Commissioner of Banks, the Savings Institutions Division of the Department of Economic and Community Development, and the Credit Union Division of the Department of Economic and Community Development; and
- (3) The Department of Insurance and the Commissioner of Insurance.

(b) Prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing. Notice to the parties shall include:

- (1) A statement of the date, hour, place, and nature of the hearing;
- (2) A reference to the particular sections of the statutes and rules involved; and
- (3) A short and plain statement of the facts alleged.

(c) Notice shall be given personally or by certified mail. If given by certified mail, notice shall be deemed to have been given on the delivery date appearing on the return receipt. If notice cannot be given personally or by certified mail, then notice shall be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) A party who has been served with a notice of hearing may file a written response with the agency. If a written response is filed, a copy of the response must be mailed to all other parties not less than 10 days before the date set for the hearing.

(e) All hearings conducted under this Article shall be open to the public. A hearing conducted

by the agency shall be held in the county where the agency maintains its principal office. A hearing conducted for the agency by an administrative law judge requested under G.S. 150B-40 shall be held in a county in this State where any person whose property or rights are the subject matter of the hearing resides. If a different venue would promote the ends of justice or better serve the convenience of witnesses, the agency or the administrative law judge may designate another county. A person whose property or rights are the subject matter of the hearing waives his objection to venue if he proceeds in the hearing.

(f) Any person may petition to become a party by filing with the agency or hearing officer a motion to intervene in the manner provided by G.S. 1A-1, Rule 24. In addition, any person interested in a contested case under this Article may intervene and participate to the extent deemed appropriate by the agency hearing officer.

(g) When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending before an agency, the agency may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

(h) Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.

**§ 150B-39. Depositions; discovery; subpoenas.**

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in a contested case may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) Upon a request for an identifiable agency record involving a material fact in a contested case, the agency shall promptly provide the record to a party, unless the record relates solely to the agency's internal procedures or is exempt from disclosure by law.

(c) In preparation for, or in the conduct of, a contested case subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the agency may quash a subpoena if, upon a hearing, the agency finds that the evidence, the production of which is required, does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Witness fees shall be paid by the party

requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to any witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

**§ 150B-40. Conduct of hearing; presiding officer; ex parte communication.**

(a) Hearings shall be conducted in a fair and impartial manner. At the hearing, the agency and the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for the use of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

If a party fails to appear in a contested case after he has been given proper notice, the agency may continue the hearing or proceed with the hearing and make its decision in the absence of the party.

(b) Except as provided under subsection (e) of this section, hearings under this Article shall be conducted by a majority of the agency. An agency shall designate one or more of its members to preside at the hearing. If a party files in good faith a timely and sufficient affidavit of the personal bias or other reason for disqualification of any member of the agency, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. If a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer shall be assigned to continue with the case, except that if assignment of a new presiding officer will cause substantial prejudice to any party, a new hearing shall be held or the case dismissed without prejudice.

(c) The presiding officer may:

- (1) Administer oaths and affirmations;
- (2) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;
- (3) Provide for the taking of testimony by deposition;
- (4) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;

(5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties; and

(6) Apply to any judge of the superior court resident in the district or presiding at a term of court in the county where a hearing is pending for an order to show cause why any person should not be held in contempt of the agency and its processes, and the court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in superior court.

(d) Unless required for disposition of an ex parte matter authorized by law, a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case under this Article shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually-related case. This section does not apply to an agency employee or party representative with professional training in accounting, actuarial science, economics or financial analysis insofar as the case involves financial practices or conditions.

(e) When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article. Upon receipt of the application, the Director shall, without undue delay, assign an administrative law judge to hear the case.

The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.

The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under this Article. The administrative law judge shall make

a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law.

An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

The agency may make its final decision only after the administrative law judge's proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency.

**§ 150B-41. Evidence; stipulations; official notice.**

(a) In all contested cases, irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under such rules to show relevant facts, they may be shown by the most reliable and substantial evidence available. It shall not be necessary for a party or his attorney to object to evidence at the hearing in order to preserve the right to object to its consideration by the agency in reaching its decision, or by the court of judicial review.

(b) Evidence in a contested case, including records and documents shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

(c) The parties in a contested case under this Article by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts

when practicable. Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

(d) Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it.

**§ 150B-42. Final agency decision; official record.**

(a) After compliance with the provisions of G.S. 150B-40(e), if applicable, and review of the official record, as defined in subsection (b) of this section, an agency shall make a written final decision or order in a contested case. The decision or order shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and shall be supported by substantial evidence admissible under G.S. 150B-41. A copy of the decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record.

(b) An agency shall prepare an official record of a hearing that shall include:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
- (5) Proposed findings and exceptions; and
- (6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

(c) Proceedings at which oral evidence is pre-

sented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests.

Article 4.

Judicial Review.

**§ 150B-43. Right to judicial review.**

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

**§ 150B-44. Right to judicial intervention when decision unreasonably delayed.**

Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge. An agency that is subject to Article 3 of this Chapter and is not a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. An agency that is subject to Article 3 of this Chapter and is a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 90 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's recommended decision as the agency's final decision. Failure of an agency subject to Article 3A of this Chapter to make a final decision within 180 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compel-

ling action by the agency or, if the case was heard by an administrative law judge, by the administrative law judge.

**§ 150B-45. Procedure for seeking review; waiver.**

To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.

The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. A person who fails to file a petition within the required time waives the right to judicial review under this Article. For good cause shown, however, the superior court may accept an untimely petition.

**§ 150B-46. Contents of petition; copies served on all parties; intervention.**

The petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings. Names and addresses of such parties shall be furnished to the petitioner by the agency upon request. Any party to the administrative proceeding is a party to the review proceedings unless the party withdraws by notifying the court of the withdrawal and serving the other parties with notice of the withdrawal. Other parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or procedure and what relief is sought in the response.

Any person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24.

**§ 150B-47. Records filed with clerk of superior court; contents of records; costs.**

Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the agency that made the final decision in the contested case shall transmit to the reviewing court the original or a certified copy of the official record in the contested case under review together with: (i) any exceptions, proposed findings of fact, or written arguments submitted to the agency in accordance with G.S. 150B-36(a); and (ii) the agency's final decision or order. With the permission of the court, the record may be shortened by stipulation of all

parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

**§ 150B-48. Stay of decision.**

At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the administrative decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65.

**§ 150B-49. New evidence.**

An aggrieved person who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. If an administrative law judge did not make a recommended decision in the case, the court shall remand the case to the agency that conducted the administrative hearing. After hearing the evidence, the agency may affirm or modify its previous findings of fact and final decision. If an administrative law judge made a recommended decision in the case, the court shall remand the case to the administrative law judge. After hearing the evidence, the administrative law judge may affirm or modify his previous findings of fact and recommended decision. The administrative law judge shall forward a copy of his decision to the agency that made the final decision, which in turn may affirm or modify its previous findings of fact and final decision. The additional evidence and any affirmation or modification of a recommended decision or final decision shall be made part of the official record.

**§ 150B-50. Review by superior court without jury.**

The review by a superior court of agency decisions under this Chapter shall be conducted by the court without a jury.

**§ 150B-51. Scope of review.**

(a) Initial Determination in Certain Cases. In reviewing a final decision in a contested case in which an administrative law judge made a recommended decision, the court shall make two initial determinations. First, the court shall determine whether the agency heard new evidence after

receiving the recommended decision. If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record. Second, if the agency did not adopt the recommended decision, the court shall determine whether the agency's decision states the specific reasons why the agency did not adopt the recommended decision. If the court determines that the agency did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the case to the agency to enter the specific reasons.

(b) Standard of Review. After making the determinations, if any, required by subsection (a), the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

**§ 150B-52. Appeal; stay of court's decision.**

A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. Pending the outcome of an appeal, an appealing party may apply to the court that issued the judgment under appeal for a stay of that judgment or a stay of the administrative decision that is the subject of the appeal, as appropriate.

Article 5.

Publication of Administrative Rules.

Repealed.

*G.S. 120-30.9H, effective July 16, 1986, requires that all letters and other documents issued by the Attorney General of the United States in which a final decision is made concerning a "change affecting voting" under Section 5 of the Voting Rights Act of 1965 be published in the North Carolina Register.*

U.S. Department of Justice

Civil Rights Division

JRD:LLT:CGM:lrj  
DJ 166-012-3  
92-3079  
92-3343

Voting Section  
P.O. Box 66128  
Washington, D.C. 20035-6128

August 28, 1992

Jesse L. Warren, Esq.  
City Attorney  
Drawer W-2  
Greensboro, North Carolina 27402

Dear Mr. Warren:

This refers to two annexations (Ordinance Nos. 92-75 and 92-88) and the designation of the annexed areas to election districts for the City of Greensboro in Guilford County, North Carolina, submissions, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submissions on June 29 and July 20, 1992.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

John R. Dunn  
Assistant Attorney General  
Civil Right Division

By:

Steven H. Rosenbaum  
Chief, Voting Section

**TITLE 2 - DEPARTMENT OF  
AGRICULTURE**

**N**otice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Pesticide Board intends to amend rule(s) cited as 2 NCAC 9L .0524 and .0701.

**T**he proposed effective date of this action is February 1, 1993.

**T**he public hearing will be conducted at 1:00 p.m. on November 5, 1992, at the Board Room, Agriculture Building, 2 West Edenton Street, Raleigh, NC 27601.

**R**eason for Proposed Action:

2 NCAC 9L .0524 - To include pest control consultants examination requirement citation from the N.C. Pesticide Law of 1971.

2 NCAC 9L .0701 - To amend the North Carolina Pesticide Board's current rule in which pine voles and meadow voles have been declared to be pests in certain sites, to clarify those sites, and to include the additional sites of institutional, recreational, and residential areas.

**C**omment Procedures: Interested persons may present statements either orally or in writing at the public hearing or in writing prior to the hearing by mail addressed to John L. Smith, Secretary, North Carolina Pesticide Board, P.O. Box 27647, Raleigh, NC 27611.

**CHAPTER 9 - FOOD AND DRUG PROTECTION DIVISION**

**SUBCHAPTER 9L - PESTICIDE SECTION**

**SECTION .0500 - PESTICIDE LICENSES**

**.0524 EXPIRATION OF CERTIFICATION**

- (a) The recertification period shall expire on June 30th.
- (b) At the direction of the Board, each certified individual will be notified 6-9 months prior to the recertification expiration date of the individual's remaining requirements for recertification.

(c) A certified individual who has completed none of the recertification options in Rule .0522 of this Section prior to the recertification expiration date shall be required to retake and satisfactorily pass a comprehensive license examination defined in G.S. 143-453 or 143-455 before a license will be reissued in any category. This examination will be based on updated training materials approved by the Board.

(d) No individual will be allowed to carry over any Continuing Certification Credits from one recertification period to another.

*Statutory Authority G.S. 143-437(1); 143-440(b); 143-453(c)(2); 143-455(d).*

**SECTION .0700 - DECLARATION OF  
PESTS AND RESTRICTIONS ON  
THEIR CONTROL**

**.0701 ORCHARD RATS**

The North Carolina Pesticide Board hereby declares as a pest pine voles [Pitymys (or Microtus) Pinetorum] and meadow voles (Microtus pennsylvanicus), (commonly called orchard rats) on or immediately adjacent to cultivated land or horticultural, nursery, or forest plantings of trees or shrubs cultivated land, forest plantations, ornamentals nurseries, orchards, or horticultural plantings in institutional, recreational, and residential areas.

*Statutory Authority G.S. 143-444(1).*

**TITLE 10 - DEPARTMENT OF HUMAN  
RESOURCES**

**N**otice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to adopt rule cited as 10 NCAC 18L .1525 and amend rules cited as 10 NCAC 14K .0103, .0314 - .0315; 14O .0106; 14Q .0106, .0303; 14R .0104 - .0105; 18J .0604; 18P .0903, .1003.

**T**he proposed effective date of this action is January 4, 1993.

**T**he public hearing will be conducted at 2:00

*p.m. on November 13, 1992 at the Wilmington Hilton, North Water Street, Garden Room - Second Floor, Wilmington, N.C. 28401.*

**R**eson for Proposed Action:

**10 NCAC 14K .0103, .0314, .0315** - *The proposed changes are to insert new language and new services into licensure requirements regarding early intervention to comply with changes in 34 CFR 303.12 (Federal Early Intervention Regulations).*

*In October of 1991, P.L. 99-457 was reauthorized by Congress. Statutory changes resulted in revisions in the federal regulations, most of which involved terminology and clarification only; however, one change involving a new service requirement is transportation.*

**10 NCAC 14O .0106** - *The proposed change is to ensure the provider has all necessary information regarding the client, and that responsibilities for the provider are specified in the agreement. In addition, the proposed change is for consistency with same subject in other services regarding licensure requirements and client record documentation.*

**10 NCAC 14Q .0303** - *To ensure informed consent is obtained whenever a restrictive intervention is employed on a planned basis.*

**10 NCAC 14R .0104** - *To more clearly state in facility policy the required time frame for a review by a qualified professional whenever a restrictive intervention is used on a planned basis.*

**10 NCAC 14R .0105** - *To qualify which facilities are subject to review by the Client Rights Committee.*

**10 NCAC 18J .0604** - *This Rule sets forth requirements regarding State facility relationships for a facility which is area-operated or a contract agency. The proposed change is to clarify the population served and to delete reference to regional director which no longer exists. The proposed amendment will allow for consistency with other Rules.*

**10 NCAC 18L .1525** - *The proposed adoption of this Rule will allow parents of a child, eligible to receive services, to accept or decline any type of*

*early intervention service without jeopardizing their right to receive other early intervention services.*

**10 NCAC 18P .0903** - *The proposed amendment is to delete the requirement for Division approval of written agreement.*

**10 NCAC 18P .1003** - *The proposed amendment is to delete the requirement for Division approval of written agreement, and to allow consistency with other similar Rules for exchange of information.*

**C**omment Procedures: Any interested person may present his comments by oral presentation or by submitting a written statement. Written comments must be sent to Charlotte Tucker, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 325 North Salisbury Street, Raleigh, North Carolina 27603 by November 2, 1992 and must state the Rules to which the comments are addressed. Persons wishing to make oral presentations should contact Charlotte Tucker at 919-733-4774 by November 11, 1992. Time limits for oral remarks may be imposed by the Commission Chairman. Fiscal information on these Rules is available from the Division by request.

**CHAPTER 14 - MENTAL HEALTH:  
GENERAL**

**SUBCHAPTER 14K - CORE LICENSURE  
RULES FOR MENTAL HEALTH: MENTAL  
RETARDATION AND OTHER DEVELOP-  
MENTAL DISABILITIES: AND  
SUBSTANCE ABUSE FACILITIES**

**SECTION .0100 - GENERAL INFORMA-  
TION**

**.0103 DEFINITIONS**

(a) This Rule contains the definitions that apply to all the rules in this Subchapter and Subchapters 14L through 14O of this Chapter.

(b) In addition to the definitions contained in this Rule, the terms defined in G.S. 122C-3 also apply to all the rules in this Subchapter and Subchapters 14L through 14O of this Chapter.

(c) The following terms shall have the meanings specified:

(1) "Administering medication" means direct application of a drug to the body

of a client by injection, inhalation, ingestion, or any other means.

(2) "Adolescent" means a minor from 13 through 17 years of age.

(3) "Adult" means a person 18 years of age or older or a person under 18 years of age who has been married or who has been emancipated by a court of competent jurisdiction or is a member of the armed forces.

(4) "Aftercare" means those services provided to substance abuse clients after discharge from a service which facilitates the client's integration or reintegration into society. Activities may include self-help groups, supportive work programs and staff follow-up contacts and interventions.

(5) "Alcohol abuse" means psychoactive substance abuse which is a residual category for noting maladaptive patterns of psychoactive substance use that have never met the criteria for dependence for that particular class of substance (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.

(6) "Alcohol dependence" means psychoactive substance dependence which is a cluster of cognitive behavioral, and physiologic symptoms that indicate that a person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.

(7) "Applicant" means any person who intends to establish, maintain or operate a licensable facility and who applies to the Department for a license to operate a facility under the provisions of G.S. 122C, Article 2.

(8) "Approved supported employment conversion plan" means a planned approach to changing the type of services delivered from ADAP facility-based to supported employment. Approval of the conversion plan is the responsibility of the Regional Director of the Division and the Area Director or his designee if the facility is operated by a contract agency of the area program or other service provider. The Division shall request appropriate personnel from the Division of Vocational Rehabilitation to participate in the review process. The request for approval of the supported employment conversion plan shall include specific written information in the following areas:

- (A) number of clients to be moved into supported employment placements;
- (B) types of supported employment models to be used;
- (C) timeframe for the conversion period;
- (D) interim proposed facility staffing patterns and responsibilities; and
- (E) proposed budget for conversion plan.

(9) "Area program" means a legally constituted public agency providing mental health, mental retardation and substance abuse services for a catchment area designated by the Commission. For purposes of these Rules, the term "area program" means the same as "area authority" as defined in G.S. 122C-3.

(10) "Assessment" means a procedure for determining the nature and extent of the problem for which the individual is seeking service.

(11) "Atypical development" in children means those from birth to 60 months of age who demonstrate significantly atypical behavioral socioemotional, motor, or sensory development as manifested by:

- (A) Diagnosed hyperactivity, attention deficit disorder or other behavioral disorders, or
- (B) Identified emotional or behavioral disorders such as:

(i) delay or abnormality in achieving expected emotional milestones, such as pleasurable interest in adults and peers; ability to communicate emotional needs; and ability to tolerate frustrations.

(ii) persistent failure to initiate or respond to most social interactions.

(iii) fearfulness or other distress that does not respond to comforting by caregivers.

(iv) indiscriminate sociability, e.g. excessive familiarity with relative strangers.

(v) self-injurious or unusually aggressive behavior, or

(C) Substantiated physical abuse, sexual abuse, or other environmental situations that raise significant concern regarding the child's emotional well-being.

(12) "Certified counselor" means an alcoholism, drug abuse or substance abuse counselor who is certified by the North Carolina Substance Abuse Professional Certification Board.

(13) "Child" means a minor from birth through 12 years of age.

(14) "Chronically mentally ill adult" means an individual 18 years of age or older who, as a result of a mental disorder, exhibits emotional or behavioral functioning which is so impaired as to interfere substantially with his capacity to remain in the community without supportive treatment or services of a long-term or indefinite duration. In these persons, mental disability is severe and persistent, resulting in long-term limitation of their functional capacities for primary activities of daily living such as interpersonal relations, homemaking, self-care, employment and recreation.

(15) "Client record" means a written account of all services provided a client from the time of admission of the client by the facility until discharge from the facility.

(16) "Clinical" means having to do with the active direct treatment/habilitation of a client.

(17) "Clinical staff member" means a professional who provides active direct treatment/habilitation to a client.

"Clinical/professional supervision" means regularly scheduled assistance by a qualified mental health professional, a qualified substance abuse professional or a qualified developmental disabilities professional to a staff member who is providing direct, therapeutic intervention to a client or clients. The purpose of clinical supervision is to ensure that each client receives appropriate treatment or habilitation which is consistent with accepted standards of practice and the needs of the client.

"Contested case" means an administrative proceeding under G.S. 150B, Article 3, in which the rights, privileges, or duties of a party are required by law to be determined.

"Contract agency" means a legally constituted entity with which the area program contracts for a service exclusive of intermittent purchase of service for an individually identified client.

"Day/night service" means a service provided on a regular basis, in a structured environment that is offered to the same individual for a period of three or more hours within a 24-hour period.

"Declaratory ruling" means a formal and binding interpretation as to:

(A) the validity of a rule; or

(B) the applicability to a given state of facts of a statute administered by the Department of Human Resources, or a rule or order of the Department of Human Resources.

"Detoxification" means the physical withdrawal of an individual from alcohol or other drugs in order that the individual can participate in rehabilitation activities.

"Developmentally delayed children" means those whose development is delayed in one or more of the following areas: cognitive development; physical development, including vision and hearing; ~~language and speech; psycho-social communication, social and emotional and self-help adaptive skills~~. The specific level of delay must be:

(A) for children from birth to 36 months of age, documented by scores 1½ standard deviations below the mean on standardized tests in at least one of

the above areas of development. Or, it may be documented by a 20 percent delay on assessment instruments that yield scores in months; and

(B) for children from 36 to 60 months of age, documented by test performance two standardized deviations below the mean on standardized tests in one area of development or by performance that is one standard deviation below the norm in two areas of development. Or, it may be documented by a 25 percent delay in two areas on assessment instruments that yield scores in months.

(25) "DFS" means the Division of Facility Services, 701 Barbour Drive, Raleigh, N.C. 27603.

(26) "Direct care staff" means an individual who provides active direct care, treatment, or rehabilitation or habilitation services to clients.

(27) "Dispensing medication" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by state and federal law. Filling or refilling drug containers with prescription drugs for subsequent use by a client is "dispensing". Providing quantities of unit dose prescription drugs for subsequent administration is "dispensing".

(28) "DMH/DD/SAS" means the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, 325 N. Salisbury Street, Raleigh, N.C. 27603.

(29) "Documentation" means provision of written, dated and authenticated evidence of the delivery of client services or compliance with statutes or rules, e.g., entries in the client record, policies and procedures, minutes of meetings, memoranda, reports, schedules, notices and announcements.

(30) "Drug abuse" means psychoactive substance abuse which is a residual category for noting maladaptive patterns of psychoactive substance use that have never met the criteria for dependence for that particular class of substance (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.

(31) "Drug dependence" means psychoactive substance dependence which is a cluster of cognitive behavioral, and physiologic symptoms that indicate that a person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.

(32) "DWI" means driving while impaired, as defined in G.S. 20-138.1.

(33) "DWI substance abuse assessment" means a service provided to persons charged with or convicted of DWI to determine the presence of chemical dependency. The "assessment" involves a face-to-face interview with a substance abuse professional.

(34) "Early Intervention Services" means those services provided for infants and toddlers specified in Section 303.12 of Subpart A of Part 303 of Title 34 of the Code of Federal Regulations, published 6/22/89. For the purposes of these services, however, transportation means assistance in the travel to and from the multi-disciplinary evaluation, specified early intervention services provided by certified developmental day centers or other center-based services designed specifically for children with or at risk for disabilities; and speech, physical or occupational therapy, or other early intervention services if provided in a specialized setting away from the child's residence. Transportation assistance may be provided by staff, existing

public or private services or by the family, who shall be reimbursed for their expenses, in accordance with applicable fee provisions. This adoption by reference does not include subsequent amendments and editions of the referenced material.

(35) "Evaluation" means an assessment service which identifies the nature and extent of an individual's problem through a systematic appraisal for the purposes of diagnosis and determination of the disability of the individual and the most appropriate plan, if any, for services.

(36) "First aid" means emergency treatment for injury or sudden illness before regular medical care is available. First aid includes artificial respiration, the Heimlich maneuver, or other Red Cross first aid techniques for relieving airway obstruction, care of wounds and burns, and temporary administering of splints.

(37) "Governing body" means, in the case of a corporation, the board of directors; in the case of an area authority, the area board; and in all other cases, the owner of the facility.

(38) "Health Services" means those services provided for infants and toddlers specified in Section 303.13 of Subpart A of Part 303 of Title 34 of the Code of Federal Regulations, published 6/22/89. This adoption by reference does not include subsequent amendments and editions of the referenced material.

(39) "Hearing" means, unless otherwise specified, a contested case hearing under G.S. 150B, Article 3.

(40) "High risk children" means those from birth to 36 months of age for whom there is clinical evidence of conditions which have a high probability of resulting in developmental delay or atypical development and for whom there is clinical evidence that developmental or therapeutic intervention may be necessary. There are two categories of high risk children. These are:

(A) High Risk-Established: Diagnosed or documented physical or mental conditions which are known to result in developmental delay or atypical development as the child matures. Such conditions are limited to the following:

- (i) chromosomal anomaly or genetic disorders associated with developmental deficits;
- (ii) metabolic disorders associated with developmental deficits;
- (iii) infectious diseases associated with developmental deficits;
- (iv) neurologic disorders;
- (v) congenital malformations;
- (vi) sensory disorders; or
- (vii) toxic exposure.

(B) High Risk-Potential: Documented presence of indicators which are associated with patterns of development and which have a high probability of meeting the criteria for developmental delay or atypical development as the child matures. There shall be documentation of at least three of the parental or family, neonatal, or postneonatal risk conditions as defined on page 12 in the 1990 publication, "NORTH CAROLINA CHILD SERVICE COORDINATION PROGRAM" available from the Division of Maternal and Child Health, Department of Environment, Health, and Natural Resources, PO Box 27687, Raleigh, NC 27611-7687. This adoption by reference does not include subsequent amendments and editions of the referenced material. These conditions are as follows:

- (i) maternal age less than 15 years;
- (ii) maternal PKU;
- (iii) mother HIV positive;
- (iv) maternal use of anticonvulsant, antineoplastic or anticoagulant drugs;
- (v) parental blindness;
- (vi) parental substance abuse;
- (vii) parental mental retardation;
- (viii) parental mental illness;
- (ix) difficulty in bonding between parent and infant;
- (x) difficulty in providing basic parenting;
- (xi) lack of stable housing;
- (xii) lack of familial and social support;
- (xiii) family history of childhood deafness;
- (xiv) maternal hepatitis B;
- (xv) birth weight less than 1500 grams;

(xvi) gestational age less than 32 weeks;

(xvii) respiratory distress (mechanical ventilator greater than six hours);

(xviii) asphyxia;

(xix) hypoglycemia (less than 25 mg/dl);

(xx) hyperbilirubinemia (greater than 20 mg/dl);

(xxi) intracranial hemorrhage;

(xxii) neonatal seizures;

(xxiii) major congenital anomalies;

(xxiv) CNS infection or trauma;

(xxv) congenitally acquired infection;

(xxvi) suspected visual impairment;

(xxvii) suspected hearing impairment;

(xxviii) no well child care by age six months;

(xxix) failure on standard developmental or sensory screening test;

(xxx) significant parental concern; and

(xxxi) suspected abuse or neglect, who:

(41) "Hours of operation" means an indication of the minimum operational hours that a service is expected to be available to clients, but not prohibiting the typical closing of a service to accommodate holidays, vacations, staff development activities and weather and facility-related conditions but taking into consideration the type of service being provided.

(42) "ICF/MR" (Intermediate Care Facility/Mentally Retarded) means a facility certified as having met federal ICF/MR requirements and which provides 24-hour personal care, habilitation, developmental and supportive services to persons with mental retardation or related conditions.

(43) "Incident" means any happening which is not consistent with the routine operation of the facility or the routine care of a client and that is likely to lead to adverse effects upon a client.

(44) "Infant" means an individual from birth through two years of age.

(45) "Legend drug" means a drug that cannot be dispensed without a prescription.

(46) "License" means a permit to operate a facility which is issued by DFS under G.S. 122C, Article 2.

(47) "Medication" means a substance recognized in the official "United States Pharmacopoeia" or "National Formu-

(48) "lary" intended for use in the diagnosis, mitigation, treatment or prevention of disease.

(49) "Minor client" means a person under 18 years of age who has not been married or who has not been emancipated by a decree issued by a court of competent jurisdiction or is not a member of the armed forces.

(50) "Neighborhood" - See "residential setting".

(51) "Nurse" means a person licensed to practice in the State of North Carolina either as a registered nurse or as a licensed practical nurse.

(52) "Operator" means the designated agent of the governing body who is responsible for the management of a licensable facility.

(53) "Outpatient" or "Outpatient service" means the same as periodic service.

(54) "Parent" means the legally responsible person unless otherwise clear from the context.

(55) "Periodic service" means a service provided through short, recurring visits for persons who are mentally ill, developmentally disabled or substance abusers.

(56) "Physical examination" means the procedures used by a physician or physician extender on behalf of a physician to determine the physiological and anatomical condition of the client. Physical examination also means medical examination.

(57) "Physician extender" means a nurse practitioner or a physician assistant approved to perform medical acts by the Board of Medical Examiners of the State of North Carolina.

(58) "Preschool age child" means a child from three through five years of age.

(59) "Private facility" means a facility not operated by or under contract with an area program.

(60) "Program evaluation" means the systematic documented assessment of program activity to determine the effectiveness, efficiency and scope of the system under investigation, to define its strengths and weaknesses and thereby to provide a basis for informed decision-making.

"Provider" means an individual, agency

or organization that provides mental health, mental retardation or substance abuse services.

(61) "Psychiatric nurse" means an individual who is licensed to practice as a registered nurse in the State of North Carolina by the North Carolina Board of Nursing and who is a graduate of an accredited master's level program in psychiatric mental health nursing with two years of experience, or has a master's degree in behavioral science with two years of supervised clinical experience, or has four years of experience in psychiatric mental health nursing.

(62) "Psychiatric social worker" means an individual who holds a master's degree in social work from an accredited school of social work and has two years of clinical social work experience.

(63) "Psychiatrist" means an individual who is licensed to practice medicine in the State of North Carolina and who has completed an accredited training program in psychiatry.

(64) "Psychotherapy" means a form of treatment of mental illness or emotional disorders which is based primarily upon verbal or non-verbal communication with the patient. Treatment is provided by a trained professional for the purpose of removing or modifying existing symptoms, of attenuating or reversing disturbed patterns of behavior, and of promoting positive personality growth and development.

(65) "Psychotropic medication" means medication with the primary function of treating mental illness or personality or behavior disorders. These medications include, but are not limited to, antipsychotics, antidepressants, neuroleptics, lithium and minor tranquilizers.

(66) "Qualified alcoholism professional" means an individual who is certified by the North Carolina Substance Abuse Professional Certification Board or who is a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of alcoholism counseling.

(67) "Qualified developmental disabilities professional" means an individual holding at least a baccalaureate degree in a discipline related to developmental disabilities, and at least two years of supervised habilitative experience in working with the mentally retarded or otherwise developmentally disabled or holding a baccalaureate degree in a field other than one related to developmental disabilities and having three years of supervised experience in working with the mentally retarded or otherwise developmentally disabled.

(68) "Qualified drug abuse professional" means an individual who is certified by the North Carolina Substance Abuse Professional Certification Board or who is a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of drug abuse counseling.

(69) "Qualified mental health professional" means any one of the following: psychiatrist, psychiatric nurse, practicing psychologist, psychiatric social worker, an individual with at least a master's degree in a related human service field and two years of supervised clinical experience in mental health services or an individual with a baccalaureate degree in a related human service field and four years of supervised clinical experience in mental health services.

(70) "Qualified nutritionist" means an individual who has a Master's degree in nutrition, nutrition education or public health nutrition and who may or may not be a registered dietitian.

(71) "Qualified substance abuse professional" means an individual who is:

- (A) certified by the North Carolina Substance Abuse Professional Certification Board; or
- (B) a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of alcoholism and drug abuse counseling.

(72) "Registered dietitian" means an individual who has successfully completed a

national examination for the Commission on Dietetic Registration and maintains registration with that commission through approved continuing education activities and events.

(73) "Rehabilitation" means training, care and specialized therapies undertaken to assist a client to reacquire or maximize any or all lost skills or functional abilities.

(74) "Research" means inquiry involving a trial or special observation made under conditions determined by the investigator to confirm or disprove a hypothesis, or to explicate some principle or effect. The term "research" as used in this document means research which is not standard or conventional; involves a trial or special observation which would place the subject at risk for injury (physical, psychological or social injury), or increase the chance of disclosure of treatment; utilizes elements or steps not ordinarily employed by qualified professionals treating similar disorders of this population; or is a type of procedure that serves the purpose of the research only and does not include treatment designed primarily to benefit the individual.

(75) "Residential setting" means a living area or zone in which the primary purpose is family residential living and which may be located in an area zoned either urban residential or rural.

(76) "Respite discharge" means that point in time when no additional incidents of respite services are anticipated.

(77) "Respite episode" means an uninterrupted period of time during which a client receives respite services.

(78) "Screening" means an assessment service which provides for a brief appraisal of each individual who presents himself for services, in order to determine the nature of the individual's problem and his need for services. Screening may also include referral to other appropriate community resources.

(79) "Secretary" means the Secretary of the Department as defined in G.S. 122C-3.

(80) "Service" means an activity or interaction intended to benefit another, with, or in behalf of, an individual who is in need of assistance, care, habilitation, intervention, rehabilitation or treatment.

(81) "Severely physically disabled person" means for the purpose of ADAP (Adult Developmental Activity Program) a person:

- (A) who has a severe physical disability which seriously limits his functional capabilities (mobility, communication, self-care, self-direction, work tolerance or work skills);
- (B) who has one or more physical disabilities resulting from amputation, arthritis, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, multiple sclerosis, muscular dystrophy, musculoskeletal disorders, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, sickle cell anemia and end stage renal disease; and
- (C) whose habilitation or rehabilitation can be expected to require multiple habilitation or rehabilitation services over an extended period of time.

(82) "Sheltered employment" means a facility's provision of work and work training by:

- (A) subcontracting from industries in the community and bringing work to the facility to be performed; or
- (B) manufacturing its own products in the facility. Clients served in a sheltered employment model are those who consistently achieve earning levels exceeding one-half of the minimum wage but who are not ready for independent employment activities.

(83) "Staff member" means any individual who is employed by the facility.

(84) "Substantially mentally retarded person" means for the purpose of ADAP a person who is mentally retarded to the degree of seriously limiting his functional capabilities, whose habilitation or rehabilitation can be expected to extend over a period of time, and including:

- (A) moderately mentally retarded persons;
- (B) severely mentally retarded persons;
- (C) profoundly mentally retarded persons; or
- (D) mentally retarded persons with a handicapping condition so severe as to

lack the potential for employment at this time, either in a sheltered or competitive setting. In addition, such individuals must have a deficit in self-help, communication, socialization or occupational skills and be recommended by the vocational rehabilitation counselor for consideration of placement in an ADAP.

(85) "Support services" means services provided to enhance an individual's progress in his primary treatment/habilitation program.

(86) "Supported employment" means a day/night service which involves paid work in a job which would otherwise be done by a non-disabled worker. Supported employment is carried out in an integrated work site where a small number of people with disabilities work together and where the work site is not immediately adjacent to another program serving persons with disabilities. It includes intensive involvement of staff working with the individuals in these integrated settings.

(87) "Toddler" means an individual from one through three years of age.

(88) "Treatment" means the process of providing for the physical, emotional, psychological and social needs of clients through services.

(89) "Treatment/habilitation plan" means a plan in which one or more professionals, privileged in accordance with 10 NCAC 14K .0319, working with the client and, in some cases, family members or other service providers, document which interventions will be provided and the goals, objectives and strategies that will be followed in providing services to the client.

(90) "Twenty-four hour facility in which medical care is an integral component" means a facility in which:

(A) the medication needs of clients may be evaluated, medication prescribed and laboratory tests ordered to assist in the diagnosis, treatment and monitoring of problems associated with the mental health, mental retardation or other developmental disabilities or substance abuse disorder of clients; and

(B) proper referral of the client is made to medical specialists when needed.

(91) "Twenty-four hour service" means a service which is provided to a client on a 24-hour continuous basis.

*Statutory Authority G.S. 122C-3; 122C-26; 143B-147.*

**SECTION .0300 - FACILITY AND PROGRAM MANAGEMENT**

**.0314 ASSESSMENT**

(a) The governing body shall develop and implement written policies regarding admission assessments for clients in each facility.

(b) Each facility shall complete an initial admission assessment for each client prior to the delivery of treatment/habilitation services. The initial assessment shall include:

(1) the presenting problem or reason for admission;

(2) the client's needs and strengths, and when appropriate, the needs and strengths of family members who may contribute to the services provided to the client;

(3) a provisional or admitting diagnosis with an established diagnosis determined within 30 days of admission, except for clients admitted to a detoxification or other 24-hour medical program for any length of time, who shall have an established diagnosis upon admission;

(4) a description of current status including the following, when applicable:

(A) mental status, including suicide potential;

(B) developmental condition or impairment;

(C) substance use or abuse;

(D) legal status or circumstances;

(E) medical condition; and

(F) family and other support systems;

(5) a description of the client's condition from family or significant others, when available; and

(6) the disposition, including referrals and recommendations.

(c) Data gathered during a screening or from other sources within 30 days prior to admission may be used to complete the assessment.

(d) For a client expected to receive services for more than 30 days, the admission assessment shall include the following within 30 days of admission:

(1) a social and family history;  
(2) a medical history; and  
(3) when applicable, histories and assessments as follows:

(A) psychiatric, including previous treatment;  
(B) substance abuse, including previous treatment;  
(C) developmental, including previous services received;  
(D) educational;  
(E) auditory and visual;  
(F) nutritional; and  
(G) vocational.

(e) For all facilities serving infants and toddlers with or at risk for developmental disabilities, delays or atypical development, except for respite, there shall be:

(1) an assessment of levels of physical, (including vision and hearing), language and speech, communication, cognitive, psychosocial social and emotional and self help adaptive skills development;  
(2) a determination of the child's unique strengths and needs in terms of these areas of development and identification of services appropriate to meet those needs;  
(3) if requested by the family, a determination of the strengths and needs of the family related to enhancing the development of the child, of the resources, priorities and concerns of the family, and the supports and services necessary to enhance the family's capacity to meet the developmental needs of their infant or toddler with or at risk for a disability. The family - focused and directed assessment shall be based on information provided through a personal interview and incorporate the family's description of the strengths and needs; these resources, priorities, and concerns in this area;  
(4) procedures developed and implemented to ensure participation by the client's family or the legally responsible person;  
(5) tests and other evaluation materials and procedures administered in the native language of the parents or other mode of communication unless it is clearly not feasible to do so;  
(6) assessment procedures and materials which are selected and administered so as not to be racially or culturally discriminatory;

(7) no single procedure used as the sole criterion for determining a child's eligibility;

(8) an integrated assessment process which involves at least two persons, each representing a different discipline or profession, with the specific number and types of disciplines based on the particular needs of the child; —One of the disciplines shall include a physician, physician's assistant or nurse practitioner;

(A) The assessment shall include current medical information provided by a physician, physician's assistant, or nurse practitioner; however, a physician, physician's assistant, or nurse practitioner is not required as one of the disciplines involved in the assessment; and

(B) Further information regarding the assessment may be found in the document "Eligibility Determination for the Infants-Toddler Program", published by the Department of Environment, Health, and Natural Resources.

(9) an evaluation process based on informed clinical opinion;

(10) an assessment process completed within 45 calendar days from the date of referral. The referral is initiated by a written request for these services made to any one of the public agencies participating in the PL 99-457 Interagency Agreement. The request becomes a referral when the area program determines that all of the following is available:

(A) the family's written consent to receive this service;  
(B) sufficient background information to enable the agency receiving the referral to establish communication through a telephone call or home visit;  
(C) reason for referral, date of referral and agency or individual making referral;  
(D) child and family identifying information such as names, child's birthdate and primary physician; and  
(E) summary of any pre-existing child and family screening or assessment infor-

mation:

(11) a 45 calendar day completion requirement which may be extended in exceptional circumstances, such as, the child's health assessment is being completed out-of-state, or family desires make it impossible to complete the assessment within the time period. The specific nature and duration of these circumstances which prevent completion within 45 days and the attempts made by the provider to complete the assessment shall be documented; and

(12) the child's family or legally responsible person shall be fully informed of the results of the assessment process.

*Statutory Authority G.S. 122C-26; 130A-144; 130A-152; 143B-147.*

#### **.0315 TREATMENT/HABILITATION PLANNING AND DOCUMENTATION**

(a) The governing body shall develop and implement written policies regarding individual treatment/habilitation plans and the qualifications of staff, based on education and experience, who will be responsible for implementation of such plans.

(b) A treatment/habilitation plan shall be based upon an assessment of the client's condition, assets and needs, and the resources to meet these needs, and shall be developed in partnership with the client.

(c) The parent or the legally responsible person of a minor shall have the opportunity to participate in the development and implementation of the minor client's individual treatment/ habilitation plan.

(d) The parent, with client consent, or the legally responsible person of an adult shall have the opportunity to participate in the development and implementation of the adult client's individual treatment/habilitation plan.

(e) Clinical responsibility for the development and implementation of the treatment/habilitation plan shall be designated.

(f) Initial treatment/habilitation objectives shall be documented, if services are to be provided, prior to the establishment and implementation of the comprehensive treatment/habilitation plan.

(g) Except as provided in Paragraphs (h) through (j) of this Rule, a comprehensive plan shall be developed and initiated within 30 days of admission for clients who are expected to receive

services from the facility beyond 30 days. The plan shall include, as appropriate to the client's needs:

- (1) documentation of the established diagnosis;
- (2) time-specific, measurable goals for treatment/habilitation;
- (3) general strategies or procedures to be undertaken in order to meet goals and the direct care staff responsible for implementation;
- (4) time-specific, measurable education or treatment goals for family or significant others, if applicable; and
- (5) a schedule for time-specific planned reviews, which may be set, in addition to those required in Paragraph (k) of this Rule.

(h) For all facilities serving infants and toddlers with or at risk for developmental disabilities, delays or atypical development, except for respite:

- (1) there shall be a habilitation plan which is referred to as the Individualized Family Service Plan (IFSP) which shall include:
  - (A) a description of the child's present health status and levels of physical (including vision and hearing), ~~language and speech~~, communication, cognitive, ~~psychosocial~~, social and emotional, and self-help skills adaptive development;
  - (B) with the concurrence of the family, a description of the family's strengths and needs related to enhancing the development of the child; the resources, priorities and concerns of the family and the supports and services necessary to enhance the family's capacity to meet the developmental needs of their infant and toddler with or at risk for a disability;
  - (C) goals for the child, and, if requested, goals for the child's family;
  - (D) criteria and time frames to be used to determine progress towards goals;
  - (E) planned habilitation procedures related to the goals;
  - (F) a statement of the specific early intervention services to be provided to meet the identified child and family needs, the initiation dates, frequency and method, duration, intensity and location (including the most natural environment) of service delivery, and

(G) the persons or agencies responsible;

(H) the designation of the staff member responsible for service coordination;

(I) the plans for transition into services which are the responsibility of the N.C. Department of Public Instruction, when applicable;

(J) the payment arrangements for the specific services delineated in Subparagraph (h)(I)(F) of this Rule;

(2) The IFSP shall be:

(A) reviewed on at least a semi-annual basis or more frequently upon the family's request; and

(B) revised as appropriate, but at least annually.

(3) The initial development and annual revision process for the IFSP for infants and toddlers shall include participation by:

(A) the parent or parents of the child;

(B) other family members, as requested by the parent;

(C) an advocate or person outside of the family if the parent requests that the person participate;

(D) the provider of the early intervention services;

(E) the service coordinator designated for the family, if different from the provider of the early intervention services; and

(F) the provider of the assessment service, if different from the provider of the early intervention services.

(4) The IFSP review shall be arranged and written notice provided to families early enough to promote maximum opportunities for attendance. The semi-annual review process shall include participation by persons identified in Subparagraphs (h)(3)(A) through (E) of this Rule. If any of these individuals are unable to attend one of the development or review meetings, arrangements shall be made for the person's involvement through other means such as participation in a telephone conference call, having a knowledgeable authorized representative attend the meeting or making pertinent records available at the meeting.

(5) The IFSP for infants and toddlers is based upon the results of the assessment referenced in 10 NCAC 14K .0314(e). However, early intervention services may commence before completion of this assessment if parental consent is obtained, the assessment is completed within the time period referenced in 10 NCAC 14K .0314(e), and an interim IFSP is developed. The interim IFSP shall include:

(A) the name of the service coordinator who will be responsible for the implementation of the IFSP and coordination with other agencies and individuals;

(B) goals for the child and family when recommended;

(C) those early intervention services that are needed immediately; and

(D) suggested activities that may be carried out by the family members.

(6) Each facility or individual who has a direct role in the provision of early intervention services specified in the IFSP is responsible for making a good faith effort to assist each eligible child in achieving the goals set forth in the IFSP.

(7) The IFSP shall be developed within 45 days of referral for those children determined to be eligible. The referral shall be as defined in 10 NCAC 14K .0314(e)(11).

(8) The contents of the IFSP must be fully explained to the parents, and informed written consent from the parents must be obtained prior to the provision of early intervention services described in the plan. If the parents do not provide consent with respect to a particular early intervention service, that service may not be provided. The early intervention services to which parental consent is obtained must be provided.

(i) The goals for a client who receives services from facilities providing day activity or alternative family living, half-way house, therapeutic camp or group home services in which the supervision and therapeutic intervention are limited to sleeping time, home living skills and leisure time activities, may be limited to life-skill, social or recreational

goals.

(j) The goals for a client who receives services from a community respite facility may be limited to the special needs of the client, including medications to be administered, dietary considerations and expectations regarding other services.

(k) A full review of each client's treatment/habilitation plan shall be conducted at least annually by the responsible professional in accordance with the facility's quality assurance plan, as determined by 10 NCAC 14K .0319. The review shall include:

- (1) the client's continuing need for service; and
- (2) a continuation or update of the client's treatment/habilitation plan as defined in Paragraph (g) of this Rule.

*Statutory Authority G.S. 122C-26; 143B-147.*

## **SUBCHAPTER 14O - LICENSURE RULES FOR FACILITIES SERVING MORE THAN ONE DISABILITY**

### **SECTION .0100 - ALTERNATIVE FAMILY LIVING**

#### **.0106 SERVICE RESPONSIBILITIES**

(a) When the governing body is not the provider of services, it shall attempt to match the client's needs with the provider.

(b) Each governing body shall maintain an application on each provider which includes the following:

- (1) full name of each person living in the facility;
- (2) place, telephone number and hours of employment for those family members who will be providing alternative family living services;
- (3) address, directions to and telephone number of residence; and
- (4) descriptions of sleeping arrangements for the client.

(c) Each governing body shall have a written agreement with each provider which includes but is not limited to the following:

- (1) the responsibility of the provider;
- (2) confidentiality requirements; and
- (3) responsibility and procedures for securing emergency services.

(d) Information regarding the client's specific needs or conditions shall be given to the provider prior to admission.

(e) ~~The governing body shall maintain a signed~~

~~copy of the agreement in the files, and a~~ A signed copy of the agreement shall be given to the provider.

(f) Each governing body shall furnish each provider with a form for recording illness, accident or medical concerns, including administration of medication. This form shall be maintained by the governing body in the client's record.

*Statutory Authority G.S. 122C-26; 143B-147.*

## **SUBCHAPTER 14Q - GENERAL RIGHTS**

### **SECTION .0300 - GENERAL CIVIL, LEGAL AND HUMAN RIGHTS**

#### **.0303 INFORMED CONSENT**

(a) Each client, or legally responsible person, shall be informed about:

- (1) the alleged benefits, potential risks, and possible alternative methods of treatment/habilitation; and
- (2) the length of time for which the consent is valid and the procedures that are to be followed if he chooses to withdraw consent. The length of time for a consent for the planned use of a restrictive intervention shall not exceed six months.

(b) A consent required in accordance with G.S. 122C-57(f) or for planned interventions by the Rules in Subchapter 14R, Section .0100, shall be obtained in writing. Other procedures requiring written consent shall include, but are not limited to, the prescription or administration of the following drugs:

- (1) Antabuse; and
- (2) Depo-Provera when used for non-FDA approved uses.

(c) Each voluntary client or legally responsible person has the right to consent or refuse treatment/habilitation in accordance with G.S. 122C-57(d). A voluntary client's refusal of consent shall not be used as the sole grounds for termination or threat of termination of service unless the procedure is the only viable treatment/habilitation option available at the facility.

(d) Documentation of informed consent shall be placed in the client's record.

*Statutory Authority G.S. 122C-51; 122C-57; 131E-67; 143B-147.*

## **SUBCHAPTER 14R - TREATMENT OR HABILITATION RIGHTS**

**SECTION .0100 - PROTECTIONS REGARDING INTERVENTION PROCEDURES**

**.0104 SECLUSION, RESTRAINT AND ISOLATION TIME OUT**

(a) This Rule governs the use of restrictive interventions which shall include:

- (1) seclusion;
- (2) physical restraint, excluding protective devices; and
- (3) isolation time-out.

(b) The use of restrictive interventions shall be limited to:

- (1) emergency situations, in order to terminate a behavior or action in which a client is in imminent danger of abuse or injury to self or other persons or when substantial property damage is occurring; or
- (2) as a planned measure of therapeutic treatment as specified in Paragraph (g) of this Rule.

(c) Restrictive interventions shall not be employed as retaliation or for the convenience of staff. Restrictive interventions shall not be used in a manner that causes harm or abuse.

(d) In accordance with Rule .0101 of Subchapter 14Q, the governing body shall have policy that delineates the permissible use of restrictive interventions within a facility.

(e) Within a facility where restrictive interventions may be used, the policy and procedures shall be in accordance with the provisions of Subparagraph (1) or (2) of this Paragraph.

(1) The governing body of the facility may develop its own policy. Such policy and facility procedures shall be submitted to and approved by the Commission and shall ensure:

- (A) timely notice and explanations to the person who is legally responsible;
- (B) valid opportunities to consent to or refuse planned interventions;
- (C) the intervention is justified, properly time-limited, and that appropriate positive and less restrictive alternatives are thoroughly, systematically and continuously considered and used;
- (D) when the restrictive intervention is used on a recurring or planned basis, it will be incorporated into a treatment/habilitation plan;
- (E) implementation by trained staff, closely supervised by a qualified professional;

(F) manner, conditions and location of the intervention are safe and humane;

(G) implementation is monitored and the monitoring results are disseminated to assure follow-through, continuing justification and timely adjustment to meet changing circumstances; and

(H) that the safeguards in this Rule are documented.

(2) If the governing body chooses not to develop its own policy, facility policy shall include provisions that specify:

- (A) the process for identifying and privileging facility employees who may authorize and implement restrictive interventions;
- (B) the duties and responsibilities of qualified or responsible professionals regarding the use of restrictive interventions;
- (C) the person responsible for documentation when restrictive interventions are used;
- (D) the person responsible for the notification of others when restrictive interventions are used; and
- (E) the person responsible for the identification of a client with a reasonably foreseeable physical consequence to the use of physical restraint and, in such cases there shall be procedures regarding:

- (i) documentation if a client with physical disability or past surgical procedures that would make affected nerves and bones sensitive to injury; and
- (ii) the identification and documentation of alternative emergency procedures, if needed.

(f) If the governing body chooses to comply with Subparagraph (e)(2) of this Rule, the following provisions shall be applicable:

(1) Any room used for seclusion or isolation time-out shall meet the following criteria:

- (A) the room shall be designed and constructed to ensure the health, safety and well-being of the client;
- (B) the floor space shall not be less than 50 square feet, with a ceiling height of not less than eight feet;
- (C) the floor and wall coverings, as well as any contents of the room, shall have a one-hour fire rating and shall

- (D) not produce toxic fumes if burned;
- (E) the walls shall be kept completely free of objects;
- (E) a lighting fixture, equipped with a minimum of a 75 watt bulb, shall be mounted in the ceiling and be screened to prevent tampering by the client;
- (F) one door of the room shall be equipped with a window mounted in a manner which allows inspection of the entire room;
- (G) glass in any windows shall be impact resistant and shatterproof;
- (H) the room temperature and ventilation shall be comparable and compatible with the rest of the facility; and
- (I) in a lockable room the lock shall be interlocked with the fire alarm system so that the door automatically unlocks when the fire alarm is activated if the room is to be used for seclusion.

(2) Whenever a restrictive intervention is utilized, documentation shall be made in the client record to include, at a minimum:

- (A) notation of the frequency, intensity and duration of the behavior which led to the intervention, and any precipitating circumstance contributing to the onset of the behavior;
- (B) the rationale for the use of the intervention, which also addresses the inadequacy of less restrictive intervention techniques;
- (C) a description of the intervention and the date, time and duration of its use;
- (D) a description of accompanying positive methods of intervention; and
- (E) signature and title of the facility employee who initiated, and of the employee who further authorized, the use of the intervention.

(3) The emergency use of restrictive interventions shall be limited, as follows:

- (A) a facility employee privileged to administer emergency interventions may employ such procedures for up to 15 minutes without further authorization;
- (B) the continued use of such interventions shall be authorized only by the responsible professional or another qualified professional who is privileged to use the restrictive interven-

(C) tion based on experience and training; the responsible or qualified professional shall meet with and conduct an assessment of the client and write a continuation authorization as soon as possible after the time of initial employment of the intervention. If the responsible professional or a qualified professional is not immediately available to conduct an assessment of the client, but concurs that the intervention is justified after discussion with the facility employee, continuation of the intervention may be verbally authorized until an on-site assessment of the client can be made; and

- (D) a verbal authorization shall not exceed 24 hours after the time of initial employment of the intervention.

(4) The following precautions and actions shall be employed whenever a client is in:

- (A) seclusion or physical restraint, excluding protective devices: periodic observation of the client shall occur at least every 15 minutes, or more often as necessary, to assure the safety of the client; appropriate attention shall be paid to the provision of regular meals, bathing, and the use of the toilet; and such observation and attention shall be documented in the client record.
- (B) isolation time-out; there shall be a facility employee in attendance with no other immediate responsibility than to monitor the client who is placed in isolation time-out; there shall be continuous observation and verbal interaction with the client when appropriate; and such observation shall be documented in the client record.
- (C) physical restraint, excluding protective devices, and the client may be subject to injury: a facility employee shall remain present with the client continuously.

(5) The use of a restrictive intervention shall be discontinued as soon as therapeutically appropriate but in no case later than 30 minutes after the client gains behavioral control. If the client is unable to gain behavioral control within the time frame specified in the authorization of the intervention, a new autho-

ization must be obtained.

(6) The written approval of the designee of the governing body shall be required when a restrictive intervention is utilized for longer than 24 continuous hours.

(7) The use of a restrictive intervention in excess of 24 continuous hours shall be considered a restriction of the client's rights as specified in G.S. 122C-62(b) or (d). The documentation requirements in this Rule shall satisfy the requirements specified in G.S. 122C-62(e) for rights restrictions.

(8) When any restrictive intervention is utilized for a client, notification of others shall occur as follows:

(A) those to be notified as soon as possible but no more than 72 hours after the behavior has been controlled to include:

(i) the treatment or habilitation team, or its designee, after each use of the intervention; and

(ii) a designee of the governing body.

(B) in a timely fashion, of the legally responsible person of a minor client or an incompetent adult client when such notification has been requested.

(9) The facility shall conduct reviews and reports on any and all use of restrictive interventions, including:

(A) a regular review by a designee of the governing body;

(B) an investigation of any unusual or possibly unwarranted patterns of utilization; and

(C) documentation of the following shall be maintained on a log:

(i) name of the client;

(ii) name of the responsible professional;

(iii) date of each intervention;

(iv) time of each intervention;

(v) type of intervention;

(vi) duration of each intervention; and

(vii) reason for use of the intervention.

(10) Nothing in this Rule shall be interpreted to prohibit the use of voluntary restrictive interventions at the client's request; however, the procedures in this Rule shall apply with the exception of Subparagraph (f)(3) of this Rule.

(g) The restrictive intervention shall be considered a planned intervention and shall be included in the client's treatment/habilitation plan whenever it is used:

(1) more than four times, or for more than 40 hours, in 30 consecutive days;

(2) in a single episode for 24 or more continuous hours in an emergency; or

(3) as a measure of therapeutic treatment designed to reduce dangerous, aggressive, self-injurious, or undesirable behaviors to a level which will allow the use of less restrictive treatment or habilitation procedures.

(h) When a restrictive intervention is used as a planned intervention, facility policy shall specify:

(1) The requirement that a consent or approval shall be considered valid for no more than six months and that the decision to continue the specific intervention shall be based on clear and recent behavioral evidence that the intervention is having a positive impact and continues to be needed;

(2) Prior to the initiation or continued use of any planned intervention, the following written notifications, consents and approvals shall be obtained and documented in the client record:

(A) approval of the plan by the responsible professional and the treatment and habilitation team, if applicable, shall be based on an assessment of the client and a review of the documentation required by Subparagraph (e)(1)(H) or (f)(2) of this Rule, whichever is applicable;

(B) consent of the client or legally responsible person, after the specific intervention and the reason for it have been explained in accordance with 10 NCAC 14Q .0201;

(C) notification of a client advocate that the specific intervention has been planned for the client and the rationale for utilization of the intervention; and

(D) physician approval, after an initial medical examination, when the plan includes a specific intervention with reasonably foreseeable physical consequences. In such cases, periodic planned monitoring by a physician shall be incorporated into the plan.

(3) Within 30 days of initiation of the use of a planned intervention, the Intervention Advisory Committee established in

accordance with Rule .0107 of this Section, by majority vote, may recommend approval or disapproval of the plan or may abstain from making a recommendation;

(4) At any time during the use of a planned intervention, if requested, the Intervention Advisory Committee shall be given the opportunity to review the treatment/habilitation plan;

(5) If any of the persons or committees specified in Subparagraphs (h)(2) or (3) of this Rule do not approve the initial use or continued use of a planned intervention, the intervention shall not be initiated or continued. Appeals regarding the resolution of any disagreement over the use of the planned intervention shall be handled in accordance with governing body policy;

(6) Documentation in the client record regarding the use of a planned intervention shall indicate:

(A) the weekly evaluation of the planned intervention by staff who implement the intervention; and

(B) the bi weekly review, every two weeks, by a qualified professional.

*Statutory Authority G.S. 122C-51; 122C-53; 122C-60; 122C-62; 131E-67; 143B-147.*

#### **.0105 PROTECTIVE DEVICES**

(a) Whenever a protective device is utilized for a client, the governing body shall develop and implement policy to ensure that:

(1) the necessity for the protective device has been assessed and the device applied by a facility employee who has been trained and privileged in the utilization of protective devices;

(2) the protective device is the least restrictive appropriate measure;

(3) the client is frequently observed and provided opportunities for toileting, exercise, etc. as needed. When a protective device limits the client's freedom of movement, the client shall be observed at least every hour. Whenever the client is restrained and subject to injury by another client, a facility employee shall remain present with the client continuously. Observations and interventions shall be documented in the client record;

(4) protective devices are cleaned at regular intervals; and

(5) for facilities operated by or under contract with an area program, the utilization of protective devices in the treatment/habilitation plan shall be subject to review by the Client Rights Committee, as required in 10 NCAC 18L .0434. Copies of this Rule and other pertinent Rules are published as Division publication STANDARDS FOR AREA PROGRAMS AND THEIR CONTRACT AGENCIES, APSM 35-1, and may be purchased at a cost of six dollars (\$6.00) per copy, if there is one.

(b) The use of any protective device for the purpose or with the intent of controlling unacceptable behavior shall be considered a mechanical restraint and shall comply with the requirements of Rule .0104 of this Section.

*Statutory Authority G.S. 122C-51; 122C-53; 122C-60; 131E-67; 143B-147.*

### **CHAPTER 18 - MENTAL HEALTH: OTHER PROGRAMS**

#### **SUBCHAPTER 18J - AREA PROGRAM MANAGEMENT STANDARDS**

##### **SECTION .0600 - STATE FACILITY RELATIONSHIPS**

#### **.0604 RESIDENTIAL POPULATION: GROUP HOMES FOR MR/ DD ADULTS**

(a) Each area program shall assure that at least one-half of the total resident population of all group homes for mentally retarded/developmentally disabled adults in its catchment area is comprised of individuals who immediately prior to their admission to a group home for mentally retarded/developmentally disabled adults were:

(1) residents of a state mental retardation center, a state psychiatric hospital, a group home for children who are mentally retarded/developmentally disabled, a specialized community residential center for children who are mentally retarded, a group home for individuals who are mentally retarded and behaviorally disordered, or a certified

(2) ICF/MR facility;  
(2) continuity of care clients as defined in G.S. 122C-63; or  
(3) clients who had been processed and approved for admission to a state facility.

(b) The area program may be exempt from the requirements in Paragraph (a) of this Rule if it is determined and approved in writing by the Division's Chief of Developmental Disabilities appropriate regional director that there is not a sufficient number of clients within the catchment area who fall within the categories listed in Paragraph (a) of this Rule to enable the area program to comply with the requirements of this Rule.

(c) Each area program shall maintain a written record indicating which clients in its area-operated or contract group homes for mentally retarded/developmentally disabled adults fall within the categories listed in Paragraph (a) of this Rule.

*Statutory Authority G.S. 122C-63; 143B-147.*

#### **SUBCHAPTER 18L - PROGRAM COMPONENT OPERATIONAL STANDARDS**

#### **SECTION .1500 - EARLY INTERVENTION SERVICES PROCEDURE SAFEGUARDS**

**.1525 CONSENT TO RECEIVE SERVICES**

The parents of a child, eligible to receive early intervention services, may determine whether they, their child, or other family members will accept or decline any type of early intervention service without jeopardizing the right to receive other early intervention services.

*Statutory Authority G.S. 143B-147; 150B-1(d); 20 U.S.C. Sections 1401 et. seq., 1471 et. seq.*

#### **SUBCHAPTER 18P - OPTIONAL SERVICES FOR INDIVIDUALS WHO ARE MENTALLY ILL OR EMOTIONALLY DISTURBED**

#### **SECTION .0900 - CONTRACTED INPATIENT PSYCHIATRIC SERVICES FOR CHILDREN: ADOLESCENT: ADULT AND ELDERLY INDIVIDUALS WHO ARE MENTALLY ILL**

##### **.0903 AREA PROGRAM/HOSPITAL AGREEMENT**

(a) A written agreement between the area program and the general hospital or private psychiat-

ric hospital shall be developed and shall specify at least the following:

(1) criteria for service availability for area program patients;  
(2) responsibilities of both parties related to admission, treatment, and discharge of patients;  
(3) parties responsible for the operation of the inpatient service;  
(4) responsibilities of each party regarding continuity of service for patients discharged from the inpatient service; and  
(5) provision for the exchange of information.

~~(b) The written agreement shall be approved by the Division.~~

*Statutory Authority G.S. 122C-51; 143B-147.*

#### **SECTION .1000 - CONTRACTED STATE HOSPITAL PSYCHIATRIC INPATIENT SERVICES FOR CHILDREN: ADOLESCENT: ADULT AND ELDERLY INDIVIDUALS WHO ARE MENTALLY ILL**

##### **.1003 AREA PROGRAM/HOSPITAL AGREEMENT**

(a) A written agreement between the area program and the hospital shall be developed and shall specify at least the following:

(1) criteria for service availability for area program patients;  
(2) provision of services to both voluntary and involuntary patients;  
(3) parties responsible for the operation of the inpatient service;  
(4) responsibilities of each party regarding continuity of service for patients discharged from the inpatient service; and  
(5) provision for the exchange of information. ~~, including at least a discharge summary, between the area program and the inpatient service.~~

~~(b) The written agreement shall be approved by the Division.~~

*Statutory Authority G.S. 122C-51; 143B-147.*

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*Notice is hereby given in accordance with G.S. 150B-21.2 that the DHR/Division of Medical Assistance intends to adopt rule 10 NCAC 26B .0123.*

**T**he proposed effective date of this action is January 4, 1993.

**T**he public hearing will be conducted at 1:30 p.m. on October 16, 1992 at the North Carolina Division of Medical Assistance, 1985 Umstead Drive, Room 132, Raleigh, NC 27603.

**R**eason for Proposed Action: This amendment will allow Medicaid to pay for all the components of the drug therapies, except for the drugs in a package per diem rate. This single coverage designation simplifies access to care for Medicaid recipients, relieving the recipient and the attending physician from having to contact multiple agencies to arrange care.

**C**omment Procedures: Written comments concerning this amendment must be submitted by October 31, 1992 to: Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC 27603, ATTN: Clarence Ervin. Oral comments may be presented at the hearing. In addition, a fiscal impact statement is available upon written request from the same address.

## CHAPTER 26 MEDICAL ASSISTANCE

### SUBCHAPTER 26B - MEDICAL ASSISTANCE PROVIDED

#### SECTION .0100 - GENERAL

##### .0123 HOME INFUSION THERAPY

(a) Self-administered Home Infusion Therapy (HIT) is covered when it is medically necessary and appropriate, and provided through an enrolled HIT agency as prescribed by a physician. "Self-administered" means that the patient and/or an unpaid primary caregiver is capable, able, and willing to administer the therapy following appropriate teaching and with adequate monitoring. The following therapies are included in this coverage when self-administered:

- (1) Total parenteral nutrition;
- (2) Enteral nutrition;
- (3) Intrathecal and intravenous chemotherapy;
- (4) Intravenous antibiotic therapy;
- (5) Pain management therapy, including subcutaneous, epidural, intrathecal, and

intravenous pain management therapy.

(b) Agencies qualified to enroll as HIT providers include:

- (1) A Medicare certified home health agency located within North Carolina;
- (2) A North Carolina licensed home health agency;
- (3) An agency with a North Carolina office that is accredited in the provision of home care by the Joint Commission on Accreditation of Health Care Organization (JCAHO) and meets the pharmaceutical and equipment services sections of the accreditation requirements.

In addition to enrolled HIT providers, agencies enrolled to provide durable medical equipment may provide the supplies, equipment, and nutrient solutions/formulae for enteral infusion therapy.

Authority G.S. 108A-25(b); 42 C.F.R. 440.230; 42 C.F.R. 4409.260.

\*\*\*\*\*

**N**otice is hereby given in accordance with G.S. 150B-21.2 that the DHR/Division of Medical Assistance intends to amend rule cited as 10 NCAC 26H .0104.

**T**he proposed effective date of this action is January 4, 1993.

**T**he public hearing will be conducted at 1:30 p.m. on November 2, 1992 at the North Carolina Division of Medical Assistance, 1985 Umstead Drive, Room 297, Raleigh, NC 27603.

**R**eason for Proposed Action: Amendment clarifies the practice that has been in place for many years. This practice allows hospital based nursing facilities with fiscal year ending September 30 and state operated facilities with a fiscal year ending June to file their cost report within 90 days after their year ends.

**C**omment Procedures: Written comments concerning this amendment must be submitted by November 17, 1992 to: Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC 27603, ATTN: Daphne Lyon. Oral comments may be presented at the hearing. In addition, a fiscal impact statement is available upon written request

from the same address.

## **CHAPTER 26** **MEDICAL ASSISTANCE**

### **SUBCHAPTER 26H - REIMBURSEMENT PLANS**

#### **SECTION .0100 - REIMBURSEMENT FOR NURSING FACILITY SERVICES**

##### **.0104 COST REPORTING: AUDITING AND SETTLEMENTS**

(a) Each facility that receives payments from the North Carolina Medicaid Program must prepare and submit a report of its costs and other financial information, such as the working trial balance, related to reimbursement annually. The report must include costs from the fiscal period beginning on October 1 and ending on September 30 and must be submitted to the state on or before the December 31 that immediately follows the September 30 year end. A new provider must submit a report for the period beginning with the date of certification and ending on September 30. Hospital based nursing facilities with a fiscal year ending other than September 30 and State operated facilities with a June fiscal year ending must file their cost reports within 90 days after their fiscal year ends. Facilities that fail to file their cost reports by the due date are subject to payment suspension until the reports are filed. The Division of Medical Assistance may extend the deadline 30 days for filing the report if, in its view, good cause exists for the delay.

(b) Cost report format. The cost report must be submitted on forms and in a format and medium approved by the Division of Medical Assistance. The account structure for the report is based on the chart of accounts published by the American Healthcare Association in 1979 but amended or modified to the extent necessary to meet the special reimbursement requirements of this plan. The Division of Medical Assistance will make one copy of the cost report format available to each facility (combination facilities receive only one) on or before July 1 of the reporting year for which the report is to be filed.

(c) Cost finding and allocation. Costs must be reported in the cost report in accordance with the following rules and in the order of priority stated.

- (1) Costs must be reported in accordance with the specific provisions of this plan as set forth in this Rule.
- (2) Costs must be reported in conformance

with the Medicare Provider Reimbursement Manual, HCFA 15.

(3) Costs must be reported in conformance with Generally Accepted Accounting Principles.

(d) The specific cost reporting guidelines related to this plan are set forth in the following Paragraphs. The state will publish guidelines, consistent with the provisions of this plan, concerning the proper accounting treatment for items described in this Rule as related operating expenses. The guidelines may be modified prior to the beginning of each cost reporting period. In no case, however, shall any modifications be applied retroactively. A provider should request clarification in writing from the state if there is uncertainty about the proper cost center classification of any particular expense item.

(1) Nursing Cost Center includes the cost of nursing staff, medical supplies, and related operating expenses needed to provide nursing care to patients, including medical records (including forms), utilization review, the Medical Director and the Pharmacy Consultant. The amount of nursing time provided to each patient must be recorded in order to allocate nursing cost between skilled and intermediate nursing care.

(2) Dietary Cost Center includes the cost of staff, raw food, and supplies needed to prepare and deliver food to patients.

(3) Laundry and Linen Cost Center includes the cost of staff, bed linens (replacement mattresses and related operating expenses needed to launder facility-provided items).

(4) Housekeeping Cost Center includes the cost of staff and supplies needed to keep the facility clean.

(5) Patient Activities Cost Center includes the cost of staff, supplies, and related operating expenses needed to provide appropriate diversionary activities for patients.

(6) Social Services includes the cost of social workers and related operating expenses needed to provide necessary social services to patients.

(7) Ancillary Cost Center includes the cost of all therapy services covered by the Medicaid program and billable medical supplies. Providers must bill Medicare Part B for those ancillary services covered under the Medicare Part B

program. Ancillary cost centers include: Radiology, Laboratory, Physical Therapy, Occupational Therapy, Speech Therapy, Oxygen Therapy, Intravenous Fluids, Billable Medical Supplies, Parenteral/Enteral Therapy and life sustaining equipment, such as oxygen concentrators, respirators, and ventilators and other specifically approved equipment.

(8) Administrative and General Cost Center includes all costs needed to administer the facility including the staff costs for the administrator, assistants, billing and secretarial personnel, personnel director and pastoral expenses. It includes the costs of copy machines, dues and subscriptions, transportation, income taxes, legal and accounting fees, start-up, and a variety of other administrative costs as set forth in the Chart of Accounts. Interest expense other than that stemming from mortgages or loans to acquire physical plant items shall be reported here.

(9) Property Ownership and Use:

(A) This cost center includes all allowable costs related to the acquisition and/or use of the physical assets including building, fixed equipment and movable equipment, that are required to deliver patient care, except the special equipment, as specified in .0104(d)(7) of this Rule that may be charged to the life-sustaining equipment cost center. Specifically it includes the following items:

- (i) all equipment expense regardless of equipment nature,
- (ii) lease expense for all physical assets,
- (iii) depreciation of assets utilizing the straight line method,
- (iv) interest expense of asset related liabilities, (e.g., mortgage expense),
- (v) property taxes.

(B) For the purposes of computing allowable lease expense and for balance sheet presentation for Return on Equity computations (see Rule .0105), leases shall not be capitalized.

(C) In establishing the allowable cost for depreciation and for interest on capital indebtedness, with respect to an asset

which has undergone a change of ownership, the valuation of the asset shall be the lesser of allowable acquisition cost less accumulated depreciation to the first owner of record on or after July 18, 1984 or the acquisition cost to the new owner. Depreciation recapture will not be performed at sale. The method for establishing the allowable related capital indebtedness shall be as follows:

- (i) The allowable asset value shall be divided by the actual acquisition cost.
- (ii) The product computed in step 1 shall be multiplied times the value of any related capital indebtedness.
- (iii) The result shall be the liability amount upon which interest may be recorded at the rate set forth in the debt instrument or such lower rate as the state may prove is reasonable. The allowable asset and liability values established through the process in this Rule shall be those used in balance sheet presentations for return on equity computation (see Rule .0105). These procedures are established to implement the provisions of PL 98-369 Section 2314.

(10) Operation of Plant and Maintenance Cost Center includes all costs necessary to operate or maintain the functionality and appearance of the plant. These include: maintenance staff, utilities, repairs and maintenance to all equipment.

(11) Equipment Expense. Equipment is defined as an item with a useful life of more than two years and a value greater than five hundred dollars (\$500.00). Equipment ownership and use costs shall be reported in the Property Ownership and Use Cost Center. Equipment maintenance and repair costs shall be reported in the Operation of Plant and Maintenance Cost Center. Equipment shall not be reported elsewhere.

(12) Training Expense. Training expense must be identified in the appropriate benefiting cost center. The costs of training nurse aides must be identified

separately and may include the cost of purchasing programs and equipment that have been approved by the State for training or testing.

(13) **Home Office Costs.** Home office costs are generally charged to the Administrative and General Cost Centers. In some cases, however, certain personnel costs which are direct patient care oriented may be allocated to "direct" patient care cost centers if time records are maintained to document the performance of direct patient care services. No Home office overhead may be so allocated. The basis of this allocation among facilities participating in the North Carolina Medicaid program may be:

(A) specific time records of work performed at each facility, or  
(B) patient days in each facility to which the costs apply relative to the total patient days in all the facilities to which the costs apply.

(14) **Management Fees.** Management fees are charged to the Administrative and General Cost Center. In some cases, however, a portion of a management fee may be allocated to a direct patient care cost center if time records are maintained to document the performance of direct patient care services. The amount so allocated may be equal only to the salary and fringe benefits of persons who are performing direct patient care services while employed by the management company. Adequate records to support these costs must be made available to staff of the Division of Medical Assistance. The basis of this allocation among facilities participating in the North Carolina Medicaid program may be:

(A) specific time records of work performed at each facility, or  
(B) patient days in each facility to which the costs apply relative to the total patient days in all the facilities to which the costs apply.

(15) **Related Organization Costs.** It is the nursing facility's responsibility to demonstrate by convincing evidence to the satisfaction of the Division of Medical Assistance that the costs are reasonable. Reasonable costs of related organiza-

tions are to be identified in accordance with direct and indirect cost center categories as follows:

(A) **Direct Cost:**

- (i) Compensation of direct care staff such as nursing personnel (aides, orderlies, nurses), food service workers, housekeeping staff and other personnel who would normally be accounted for in a direct cost center.
- (ii) Supplies and services that would normally be accounted for in a direct cost center.
- (iii) Capital, rental, maintenance, supplies/repairs and utility costs (gas, water, fuel, electricity) for facilities that are not typically a part of a nursing facility. These facilities might include such items as warehouses, vehicles for delivery and offices which are totally dedicated or clearly exceed the number, size, or complexity required for a normal nursing facility, its home office, or management company.
- (iv) Compensation of all administrative staff who perform no duties which are related to the nursing facility or its home office and who are neither officers nor owners of the nursing facilities or its home office.

(B) **Indirect Cost:**

- (i) Capital, rental, maintenance, supplies/repairs, and utility costs which are normally or frequently a part of a nursing facility. This would include, for example, kitchen and laundry facilities.
- (ii) Home office costs except for salary and fringe benefits of Personnel, Accounting and Data Processing staff which are allocated by acceptable methods are direct costs when the work performed is specific to the related organization that provides a direct care service or product to the provider.
- (iii) Compensation of all administrative staff who perform any duties for the nursing facility or its home office.

- (iv) All compensation of all officers and owners of the nursing facility or its home office, or parent corporation.

The related organization must file a Medicaid Cost Statement (DMA-4083) identifying their costs, adjustments to costs, allocation of costs, equity capital, adjustments to equity capital, and allocations of equity capital along with the nursing facilities cost report. A home office, or parent company, will be recognized as a related organization. Auditable records to support these costs must be made available to staff of the Division of Medical Assistance and its designated contract auditors. Undocumented costs will be disallowed. It is the nursing facility's responsibility to demonstrate by convincing evidence to the satisfaction of the Division of Medical Assistance that the criteria in the Provider Reimbursement Manual, Section 1010, has been met in order to be recognized as an exception to the related organization principle. When a related organization is deemed an exception: reasonable charges by the related organization to the nursing facility are recognized as allowable costs; receivable/payables from/to the nursing facility and related organization deemed an exception are not adjusted from the nursing facility's balance sheet in computing equity capital.

(e) Auditing and Settlement. All filed cost reports must be desk audited and interim reimbursement settlements made in accordance with the provision of this plan. This settlement is issued within 180 days of the date the cost report was filed or within 180 days of December 31 of the fiscal year to which the report applies, whichever is later. The state may elect to perform field audits on any filed cost reports within three years of the date of filing and issue a final settlement on a time schedule that conforms to Federal law and regulation. If the state decides not to field audit a facility a final reimbursement notice may be issued based on the desk audited settlement. The state may reopen and field audit any cost report after the final settlement notice to comply with Federal law and regulation or to enforce laws and regulations prohibiting abuse of the Medicaid Program and particularly the provisions of this reimbursement plan.

Authority G.S. 108A-25(b); 108A-54; 108A-55; S.L. 1985, c. 479, s. 86; 42 C.F.R. 447, Subpart C.

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**TITLE 15A - DEPARTMENT OF  
ENVIRONMENT, HEALTH, AND**

**NATURAL RESOURCES**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Wildlife Resources Commission intends to amend the rule cited as 15A NCAC 10D .0003*

*The proposed effective date of this action is January 1, 1993.*

*The public hearing will be conducted at 7:30 p.m., October 20, 1992, Ground Floor Hearing Room, Archdale Building, 512 N. Salisbury Street, Raleigh, NC 27604-1188.*

**Reason for Proposed Action:** *To allow limited access to certain game lands for horseback riding.*

**Comment Procedures:** *Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments from October 1, 1992 to October 31, 1992. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 N. Salisbury Street, Raleigh, NC 27604-1188.*

**CHAPTER 10 - WILDLIFE RESOURCES  
AND WATER SAFETY**

**SUBCHAPTER 10D - GAME LAND  
REGULATIONS**

**.0003 HUNTING ON GAME LANDS**

(a) Safety Requirements. No person while hunting on any designated game land shall be under the influence of alcohol or any narcotic drug, or fail to comply with special restrictions regarding the use of the Blue Ridge Parkway where it adjoins game lands listed in this Rule.

(b) Traffic Requirements. No person shall park a vehicle on game lands in such a manner as to block traffic, gates or otherwise prevent vehicles from using any roadway.

(c) Tree Stands. It is unlawful to erect or to occupy, for the purpose of hunting, any tree stand or platform attached by nails, screws, bolts or wire to a tree on any game land designated herein. This prohibition shall not apply to lag-screw steps or portable stands that are removed after use with no metal left remaining in or attached to the tree.

(d) Time and Manner of Taking. Except where

closed to hunting or limited to specific dates by these regulations, hunting on game lands is permitted during the open season for the game or furbearing species being hunted. On managed waterfowl impoundments, hunters shall not enter the posted impoundment areas earlier than 4:00 a.m. on the permitted hunting dates, and hunting is prohibited after 1:00 p.m. on such hunting dates; decoys may not be set out prior to 4:00 a.m. and must be removed by 3:00 p.m. each day. No person shall operate any vessel or vehicle powered by an internal combustion engine on a managed waterfowl impoundment.

No person shall attempt to obscure the sex or age of any bird or animal taken by severing the head or any other part thereof, or possess any bird or animal which has been so mutilated.

No person shall place, or cause to be placed on any game land, salt, grain, fruit, or other foods without prior written authorization of the commission or its agent. No person shall take or attempt to take any game birds or game animals attracted to such foods.

No live wild animals or wild birds shall be removed from any game land.

(e) Hunting Dates:

(1) Doves may be taken on the following game lands and dove hunting is limited to Mondays, Wednesdays, Saturdays and to Thanksgiving, Christmas and New Year's Days within the federally-announced season:

Buncombe County--Browntown Farms Game Land

Guilford County--Guilford County Farm Game Land

Lenoir County--Caswell Farm Game Land

Wayne County--Cherry Farm Game Land

(2) Any game may be taken during the open seasons on the following game lands and hunting is limited to Mondays, Wednesdays, Saturdays and Thanksgiving, Christmas and New Year's Days. In addition, deer may be taken with bow and arrow on the opening day of the bow and arrow season for deer. Raccoon and opossum hunting may continue until 7:00 a.m. on Tuesdays, until 7:00 a.m. on Thursdays, and until midnight on Saturdays. Additional restrictions apply as indicated in parentheses following specific designations:

Ashe County--Carson Woods Game Land

Bertie County--Bertie County Game Lands

Bladen County--Bladen Lakes State Forest Game Lands (Handguns may not be carried and, except for muzzle-loaders, rifles larger than .22 caliber rimfire may not be used or possessed. On the Breeze Tract and the Singletary Tract deer and bear may be taken only by still hunting. Deer of either sex may be taken on the first Wednesday after Thanksgiving and on the second Saturday after Thanksgiving.)

Caswell County--Caswell Game Land

Catawba and Iredell Counties--Catawba Game Land (No deer may be taken from the tract known as Island Point and deer may be taken with bow and arrow only from the tract known as Molly's Backbone.)

Lenoir County--H.M. Bizzell, Sr., Game Land  
Onslow County--White Oak River Impoundment Game Land (In addition to the dates above indicated, waterfowl may be taken on the opening and closing days of the applicable waterfowl seasons.)

Pender County--Holly Shelter Game Land (In addition to the dates above indicated, waterfowl may be taken on the opening and closing days of the applicable waterfowl seasons. Deer of either sex may be taken on Mondays, Wednesdays, and Saturdays from the first Wednesday after Thanksgiving through the third Saturday after Thanksgiving.)

Richmond, Scotland and Moore Counties--Sandhills Game Land (The regular gun season for deer consists of the open hunting dates from the second Monday before Thanksgiving to the third Saturday after Thanksgiving except on the field trial grounds where the gun season is from the second Monday before Thanksgiving to the Saturday following Thanksgiving. Deer may be taken with bow and arrow on all open hunting dates during the bow and arrow season, as well as during the regular gun season. Deer may be taken with muzzle-loading firearms on Monday, Wednesday and Saturday of the second week before Thanksgiving week, and during the regular gun season. Except for the deer seasons above indicated and the managed either-sex permit hunts, the field trial grounds are closed

to all hunting during the period October 22 to March 31. In addition to the regular hunting days, waterfowl may be taken on the opening and closing days of the applicable waterfowl seasons.)

Wild turkey hunting is by permit only.

Robeson County--Bullard and Branch Hunting Preserve Game Land

Stokes County--Sauratown Plantation Game Land

Yadkin County--Huntsville Community Farms Game Land

(3) Any game may be taken on the following game lands during the open season, except that:

(A) Bears may not be taken on lands designated and posted as bear sanctuaries;

(B) Wild boar may not be taken with the use of dogs on such bear sanctuaries, and wild boar may be hunted only during the bow and arrow seasons, the muzzle-loading deer season and the regular gun season on male deer on bear sanctuaries located in and west of the counties of Madison, Buncombe, Henderson and Polk;

(C) On game lands open to deer hunting located in or west of the counties of Rockingham, Guilford, Randolph, Montgomery and Anson, the following rules apply to the use of dogs during the regular season for hunting deer with guns:

(i) Except for the counties of Cherokee, Clay, Jackson, Macon, Madison, Polk, and Swain, game birds may be hunted with dogs.

(ii) In the counties of Cherokee, Clay, Jackson, Macon, Madison, Polk, and Swain, small game in season may be hunted with dogs on all game lands except on bear sanctuaries.

(D) On Croatan, Goose Creek, New Hope and Shearon Harris Game Lands waterfowl may be taken only on Mondays, Wednesdays, Saturdays; on Thanksgiving, Christmas and New Year's Days; and on the opening and closing days of the applicable waterfowl seasons; except that outside the posted waterfowl impoundments on Goose Creek Game Land hunting any waterfowl in season is permitted any

week day during the last 10 days of the regular duck season as established by the U.S. Fish and Wildlife Service; On the Pamlico Point, Campbell Creek, and Spring Creek impoundments a special permit is required for hunting on those opening and closing days of the waterfowl season as well as on those Saturdays that fall after November 1 of the season and on Thanksgiving and New Year's day;

(E) On the posted waterfowl impoundments of Gull Rock Game Land hunting of any species of wildlife is limited to Mondays, Wednesdays, Saturdays; Thanksgiving, Christmas, and New Year's Days; and the opening and closing days of the applicable waterfowl seasons;

(F) On bear sanctuaries in and west of Madison, Buncombe, Henderson and Polk Counties dogs may not be trained or allowed to run unleashed between March 1 and October 11;

(G) On New Lake, Pungo River, and Gull Rock Game Lands deer of either sex may be taken from the first Wednesday after Thanksgiving through the third Saturday after Thanksgiving;

(H) On Butner-Falls of Neuse and Person Game Lands waterfowl may be taken only on Tuesdays, Thursdays and Saturdays, Christmas and New Year's Days, and on the opening and closing days of the applicable waterfowl seasons;

(I) On Angola Bay, Butner-Falls of Neuse, Croatan, Goose Creek, and Hofmann Forest Game Lands deer of either sex may be taken from the first Wednesday after Thanksgiving through the following Saturday;

(J) Horseback riding is allowed on the Caswell and Thurmond Chatham game lands only during June, July, and August and on Sundays during the remainder of the year except during open turkey and deer seasons. Horseback riding is allowed only on roads opened to vehicular traffic. Participants must obtain a game lands license prior to engaging in such activity;

(K) On the posted waterfowl impoundments on the New Hope and

Butner-Falls of Neuse game lands a special permit is required for all waterfowl hunting;

(L) Additional restrictions or modifications apply as indicated in parentheses following specific designations:

Alexander and Caldwell Counties--Brushy Mountains Game Lands

Anson County--Anson Game Land

Anson, Montgomery, Richmond and Stanly Counties--Pee Dee River Game Lands

Ashe County--Elk Ridge Game Lands

Ashe County--Cherokee Game Lands

Ashe and Watauga Counties--Elk Knob Game Land

Avery, Buncombe, Burke, Caldwell, Haywood, Henderson, Jackson, Madison, McDowell, Mitchell, Transylvania, Watauga and Yancey Counties--Pisgah Game Lands (Harmon Den and Sherwood Bear Sanctuaries in Haywood County are closed to hunting raccoon, opossum and wildcat. Training raccoon and opossum dogs is prohibited from March 1 to October 11 in that part of Madison County north of the French Broad River, south of US 25-70 and west of SR 1319.)

Bertie and Washington Counties--Bachelor Bay Game Lands

Beaufort and Pamlico Counties--Goose Creek Game Land

Brunswick County--Green Swamp Game Land

Burke and Cleveland Counties--South Mountains Game Lands

Caldwell, Watauga and Wilkes Counties--Yadkin Game Land

Carteret, Craven and Jones Counties--Croatan Game Lands

Chatham County--Chatham Game Land

Chatham, Durham, Orange, and Wake

Counties--New Hope Game Lands (On areas posted as "archery zones" hunting is limited to bow and arrow. Horseback riding, including all equine species, is prohibited allowed only during March, June, July, and August and on Sundays during the remainder of the year.)

Chatham and Wake Counties--Shearon Harris Game Land

Cherokee, Clay, Graham, Jackson, Macon, Swain and Transylvania

Counties--Nantahala Game Lands. Raccoon and opossum may be hunted only from sunset Friday until sunrise on Saturday and from sunset until 12:00 midnight on Saturday on Fires Creek Bear Sanctuary in Clay County and in that part of Cherokee County north of US 64 and NC 294, east of Persimmon Creek and Hiwassee Lake, south of Hiwassee Lake and west of Nottely River; in the same part of Cherokee County dog training is prohibited from March 1 to October 11. It is unlawful to train dogs or allow dogs to run unleased on any game land in Graham County between March 1 and October 11.

Chowan County--Chowan Game Land

Cleveland County--Gardner-Webb Game Land

Craven County--Neuse River Game Land

Currituck County--North River Game Land

Currituck County--Northwest River Marsh Game Land

Dare County--Dare Game Land (No hunting on posted parts of bombing range.)

Davidson, Davie, Montgomery, Rowan and Stanly Counties--Alcoa Game Land

Davidson County--Linwood Game Land

Davidson, Montgomery and Randolph Counties--Uwharrie Game Land

Duplin and Pender Counties--Angola Bay Game Land

Durham, Granville and Wake Counties--Butner-Falls of Neuse Game Land (On that part marked as the Penny Bend Rabbit Research Area no hunting is permitted. Horseback riding, including all equine species, is prohibited allowed only during March, June, July, and August and on Sundays during the remainder of the year.)

Franklin County--Franklin Game Lands

Gates County--Chowan Swamp Game Land

Henderson, Polk and Rutherford Counties--Green River Game Lands

Hyde County--Gull Rock Game Land

Hyde County--Pungo River Game Land

Hyde and Tyrrell Counties--New Lake Game Land

Jones and Onslow Counties--Hofmann Forest Game Land

Lee County--Lee Game Land

McDowell County--Hickory Nut Mountain

Game Land  
McDowell and Rutherford  
Counties--Dysartsville Game Lands  
Moore County--Moore Game Land  
New Hanover County--Sutton Lake Game  
Land  
Person County--Person Game Land  
Transylvania County--Toxaway Game Land  
Tyrrell County--Lantern Acres Game Land  
Vance County--Vance Game Land. (The  
use of dogs, centerfire rifles and  
handguns for hunting deer is prohibi-  
ted on the Nutbush Peninsula tract of  
Vance Game Lands.)  
Wilkes County--Thurmond Chatham Game  
Land

(4) Deer of either sex may be taken on the  
hunt dates indicated by holders of per-  
mits to participate in managed hunts  
scheduled and conducted in accordance  
with this Subparagraph on the game  
lands or portions of game lands includ-  
ed in the following schedule:

Friday and Saturday of the first week  
after Thanksgiving Week:

Uwharrie and Alcoa southeast of NC  
49

Thursday and Friday of the week before  
Thanksgiving Week:

Sandhills east of US 1  
Sandhills west of US 1

Application forms for permits to partici-  
pate in managed deer hunts on game  
lands, together with pertinent informa-  
tion and instructions, may be obtained  
from hunting and fishing license agents  
and from the Wildlife Resources Com-  
mission. Completed applications must  
be received by the Commission not  
later than the first day of October next  
preceding the dates of hunt. Permits  
are issued by random computer selec-  
tion, are mailed to the permittees 30  
days prior to the hunt, and are non-  
transferable. A hunter making a kill  
must tag the deer and report the kill to  
a wildlife cooperator agent.

(5) The following game lands and Federal  
Wildlife Refuge are closed to all hunt-  
ing except to those individuals who  
have obtained a valid and current per-  
mit from the Wildlife Resources Com-  
mission: Bertie, Halifax and Martin  
Counties--Roanoke River Wetlands;  
Bertie County--Roanoke River National

Wildlife Refuge.

Dare County--Dare Game Lands  
(Those parts of bombing range posted  
against hunting)

Davie--Hunting Creek Swamp Water-  
fowl Refuge

Gaston, Lincoln and Mecklenburg  
Counties--Cowan's Ford Waterfowl Refuge (except  
for youth either-sex deer hunts by  
permit only on the first and second Saturdays in  
October).

*Statutory Authority G.S. 113-134; 113-264;  
113-291.2; 113-291.5; 113-305.*

\* \* \* \* \*

*Notice is hereby given in accordance with G.S.  
150B-21.2 that the North Carolina Wildlife Re-  
sources Commission intends to amend rule cited as  
15A NCAC 10F .0336.*

*The proposed effective date of this action is  
January 1, 1993.*

*The public hearing will be conducted at 10:00  
a.m. on October 16, 1992 at Room 332, Archdale  
Building, 512 N. Salisbury Street, Raleigh, NC  
27604-1188.*

*Reason for Proposed Action: Necessary to  
decrease incidences of speeding boats in high risk  
areas.*

*Comment Procedures: Interested persons may  
present their views either orally or in writing at  
the hearing. In addition, the record of hearing  
will be open for receipt of written comments from  
October 1, 1992 to October 31, 1992. Such  
written comments must be delivered or mailed to  
the N.C. Wildlife Resources Commission, 512 N.  
Salisbury Street, Raleigh, NC 27604-1188.*

## CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

### SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

#### SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

**.0336 NORTHAMPTON COUNTY**

(a) Regulated Area. This Rule applies only to that portion of Lake Gaston which lies within the boundaries of Northampton County.

(b) ~~Speed Limit Near Ramps.~~ No person shall operate a vessel at greater than no-wake speed within 50 yards of any public boat launching ramp while on the waters of Gaston Lake in Northampton County.

(c) ~~(b) Speed Limit in Mooring Areas.~~ No person shall operate a vessel at greater than no-wake speed while within a marked mooring area established with the approval of the Executive Director, or his representative, on the waters of Gaston Lake in Northampton County.

(d) ~~Speed Limit Near Bridge.~~ No person shall operate a vessel at greater than no-wake speed within 50 yards on either side of the Pea Hill Creek Bridge.

(e) ~~Speed Limit Near Shore Facilities.~~ No person shall operate a vessel at greater than no-wake speed within 50 yards of any marked boat launching area, dock, pier, bridge, marina, boat storage structure, or boat service area on the waters of the regulated areas described in Paragraph (a) of this Rule.

(f) ~~(d) Restricted Swimming Areas.~~ No person operating or responsible for the operation of a vessel shall permit it to enter any marked public swimming area established with the approval of the Executive Director, or his representative, on the waters of Gaston Lake in Northampton County.

(g) ~~(e) Placement and Maintenance of Markers.~~ The Board of Commissioners of Northampton County is designated a suitable agency for placement and maintenance of the markers implementing this Rule, subject to the approval of the United States Coast Guard and United States Army Corps of Engineers. With regard to marking Gaston Lake, all of the supplementary standards listed in Rule .0301(g) of this Section shall apply.

*Statutory Authority G.S. 75A-3; 75A-15.*

**TITLE 21 - OCCUPATIONAL  
LICENSING BOARD**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Medical Examiners of the State of North Carolina intends to adopt rule cited as 21 NCAC 32B .0215 and amend rule(s) cited as 21 NCAC 32A .0001; 32B .0101, .0209-.0214, .0305, .0314, .0315; 32C .0003, .0006.*

*The proposed effective date of this action is January 1, 1993.*

*The public hearing will be conducted at 9:00 a.m. on November 2, 1992 at the NC Board of Medical Examiners, 1203 Front Street, Raleigh, NC 27609.*

***Reason for Proposed Action:***

<u>Rule</u>	<u>Reason</u>
32B .0215	<i>Adopt new rule to explain combinations of old and new exams acceptable for licensure.</i>
32A .0001	<i>Amend to change office address and include PO mailing address.</i>
32B .0101	<i>Amend rules to include a new national exam, USLME, as a basis for licensure in NC and to allow the Assistant Executive Secretary to conduct personal licensure interviews in 32B .0214.</i>
32B .0209	
32B .0210	
32B .0211	
32B .0214	
32B .0305	
32B .0314	
32B .0315	
32B .0212	<i>Amend rule to indicate that exams held in June and December are licensing exams.</i>
32B .0213	<i>Amend rule to do additional background checks before licensing physicians when they finish postgraduate training.</i>
32C .0003	<i>Amend to allow the Assistant Executive Secretary to sign forms.</i>
32C .0006	

**Comment Procedures:** Persons interested may present written or oral statements relevant to the actions proposed at a hearing to be held as indicated above. Written statements not presented at the hearing should be directed before October 16, 1992, to the following address: Administrative Procedures, NC Board of Medical Examiners, P.O. Box 26808, Raleigh, NC 27611-6808.

**CHAPTER 32 - BOARD OF MEDICAL**

EXAMINERS

SUBCHAPTER 32A - ORGANIZATION

.0001 LOCATION

The location of the office of the Board of Medical Examiners is 4313 Navaho Drive, 1203 Front Street, Raleigh, North Carolina 27609. The phone number is (919) 876-3885 (919) 828-1212. The mailing address is Post Office Box 26808, Raleigh, North Carolina 27611-6808.

*Statutory Authority G.S. 90-2.*

SUBCHAPTER 32B - LICENSE TO  
PRACTICE MEDICINE

SECTION .0100 - GENERAL

.0101 DEFINITIONS

The following definitions apply to Rules within this Subchapter:

- (1) ACGME - Accreditation Council for Graduate Medical Education.
- (2) AOA - American Osteopathic Association.
- (3) Board - Board of Medical Examiners of the State of North Carolina.
- (4) ECFMG - Educational Commission for Foreign Medical Graduates.
- (5) Fifth Pathway - an avenue for licensure as defined in the Directory of Accredited Residencies 1977-1978, American Medical Association, pp. 30-32.
- (6) FLEX - Federation Licensing Examination. (not administered after December 1993)
- (7) LCME - Liaison Commission on Medical Education.
- (8) SPEX - Special Purpose Examination.
- (9) AMA Physician's Recognition Award - American Medical Association recognition of achievement by physicians who have voluntarily completed programs of continuing medical education.
- (10) American Specialty Boards - specialty boards approved by the American Board of Medical Specialties.
- (11) USMLE - United States Medical Licensing Examination.

*Statutory Authority G.S. 90-6.*

SECTION .0200 - LICENSE BY WRITTEN

EXAMINATION

.0209 FEE

(a) FLEX fee

- (1) The fee for both components of the FLEX written examination taken together is two hundred and fifty dollars (\$250.00), plus the cost of test materials, due at the time of application.
- (2) If the two FLEX components are taken separately, the fee for each component is due at the time of application for that component as follows:

(1) for the first component, two hundred and fifty dollars (\$250.00) plus the cost of test materials;

(2) for the second component, one hundred and fifty dollars (\$150.00) plus the cost of test materials.

(b) USMLE fee - The fee for USMLE is two hundred and fifty dollars (\$250.00), plus the cost of test materials, due at the time of application.

(c) Fees are non-refundable.

(d) ~~In the event the applicant fails to make a passing score on both components taken together or either component taken separately, the fee will not be refunded.~~

(e) ~~In the event the applicant does not appear for the regularly scheduled examination or the application is withdrawn, no portion of the fee will be refunded.~~

*Statutory Authority G.S. 90-15.*

.0210 DEADLINE

All application materials must be in the Board's office at least 75 90 days prior to the written examination. The 75 90 day deadline may be waived on the certification of graduation requirement, Rule .0203 of this Section, if the applicant is either in attendance at a medical school approved by LCME or AOA located in North Carolina or is a citizen of the State of North Carolina. However, before the examination, the applicant must satisfy the certificate of graduation requirement as follows:

- (1) Not less than 75 90 days before the date of the examination, the Board must receive a letter from the dean of the applicant's medical school stating that the applicant is expected to complete all requirements for graduation prior to the

date of the examination.

(2) Prior to the date of the examination, the Board must receive a letter from the dean of the medical school stating that the applicant has completed all requirements for, and will receive, the M.D. degree from the medical school.

(3) After the applicant's graduation, the Board must receive a letter from the applicant's medical school certifying the date on which the applicant received the M.D. degree. This certification must bear the signature of the dean or other official and the seal of the medical school.

*Statutory Authority G.S. 90-9.*

#### **.0211 PASSING SCORE**

To pass the FLEX written examination, the applicant is required to attain a score of at least 75 on FLEX Component I and a score of at least 75 on FLEX Component II. Components may be taken in tandem. Any component that is failed may be retaken; however, Component II may not be taken alone unless the applicant has passed Component I within the last seven years. Both components must be passed within seven years of the date of taking the initial examination.

To pass Step 3 of the USMLE written examination, the applicant is required to attain a score of at least 75.

*Statutory Authority G.S. 90-9; 90-12; 90-15.*

#### **.0212 TIME AND LOCATION**

The Board holds two licensing examinations each year, one in June and one in December, in Raleigh, North Carolina.

*Statutory Authority G.S. 90-5.*

#### **.0213 GRADUATE MEDICAL EDUCATION AND TRAINING FOR LICENSURE**

Before licensure, physicians who pass the written examination must furnish the following:

(1) Board application questionnaire;

(2) proof of graduate medical education and training taken after graduation from medical school as follows:

(+) (A) Graduates of medical schools approved by LCME or AOA must have satisfactorily completed one year of graduate medical education and training approved by ACGME or AOA.

(2)(B) Graduates of medical schools other than those approved by LCME or AOA must have satisfactorily completed three years of graduate medical education and training approved by ACGME or AOA;

(3) letters from all training program directors since passing the written examination;

(4) reports from all states in which the applicant has ever been licensed to practice medicine indicating the status of the applicant's license and whether or not the license has been revoked, suspended, surrendered, or placed on probationary terms (mailed directly from other state boards to the Board);

(5) AMA Physician Profile (requested of AMA by the Board); and

(6) Federation inquiry (requested of the Federation of State Medical Boards by the Board).

*Statutory Authority G.S. 90-9.*

#### **.0214 PERSONAL INTERVIEW**

To be eligible for the written examination, applicants who are graduates of medical schools not approved by the LCME or AOA must appear before the Executive Secretary or Assistant Executive Secretary for a personal interview upon completion of all credentials. This interview must be conducted at least 75 90 days prior to the date of the examination.

*Statutory Authority G.S. 90-6.*

#### **.0215 EXAMINATION COMBINATIONS**

(a) The routine examination sequences are as follows:

(1) National Board Part I  
National Board Part II  
National Board Part III

(2) FLEX Component 1  
FLEX Component 2

(3) USMLE Step 1  
USMLE Step 2  
USMLE Step 3

(b) The following combinations are acceptable for licensure if completed prior to the year 2000:

(1) National Board Part I or USMLE Step 1 plus  
National Board Part II or USMLE Step 2 plus  
National Board Part III or USMLE Step

(2) 3  
FLEX Component 1 plus USMLE Step 3  
(3) National Board Part I or USMLE Step 1 plus  
National Board Part II or USMLE Step 2 plus  
FLEX Component 2

Statutory Authority G.S. 90-6; 90-9; 90-11.

## SECTION .0300 - LICENSE BY ENDORSEMENT

### .0305 EXAMINATION BASIS FOR ENDORSEMENT

(a) To be eligible for license by endorsement of credentials, graduates of medical schools approved by the LCME or AOA must supply certification of passing scores on one of the following written examinations:

(1) National Board of Medical Examiners;  
(2) FLEX - under Rule .0314 of this Section;  
(3) Written examination other than FLEX from the state board which issued the original license by written examination; or  
(4) National Board of Osteopathic Examiners, all parts taken after January 1, 1990; or  
(5) USMLE - Step 1, Step 2, Step 3 of USMLE or a combination of examinations as set out in Rule .0215 of this Subchapter.

(b) Graduates of medical schools not approved by LCME or AOA must supply certification of passing scores on one of the following written examinations:

(1) FLEX - under Rule .0314 of this Section; or  
(2) Written examination other than FLEX from the state board which issued the applicant's original license by written examination together with American Specialty Board certification; or  
(3) USMLE - Step 1, Step 2, Step 3 of USMLE or a combination of examinations as set out in Rule .0215 of this Subchapter.

(c) A physician who has a valid and unrestricted license to practice medicine in another state, based on a written examination testing general medical knowledge, and who within the past five years has become, and is at the time of application, certified

or recertified by an American Specialty Board, is eligible for license by endorsement.

(d) Applicants for license by endorsement of credentials with FLEX scores that do not meet the requirements of Rule .0314 of this Section must meet the requirements of Paragraph (c) in this Rule.

Statutory Authority G.S. 90-10; 90-13.

### .0314 PASSING FLEX EXAM SCORE

(a) FLEX - Physicians who have taken the FLEX examination may be eligible to apply for a license by endorsement of credentials if they meet the following score requirements:

(1) FLEX taken before January 1, 1983 - A FLEX weighted average of 75 or more on a single three day examination is required.  
(2) FLEX taken after January 1, 1983 - A FLEX weighted average of 75 or more on a single three day examination, with a score not less than 70 on Day I, a score not less than 75 on Day II, and a score not less than 75 on Day III, is required.  
(3) FLEX taken after January 1, 1985:  
    (A) A score of at least 75 on FLEX Component I and a score of at least 75 on FLEX Component II is required.  
    (B) Components may be taken in tandem. Any component that is failed may be retaken; however, Component II may not be taken alone unless the applicant has passed Component I within the last seven years.  
    (C) Both components must be passed within seven years of the date of taking the initial examination.

(b) USMLE - Physicians who have taken the USMLE may be eligible to apply for a license by endorsement of credentials if they meet the following score requirements:

(1) A score of at least 75 is required on Step 3.  
(2) The USMLE Step 3 must be passed within seven years of the date of taking Step 1.

(c) Examination Combinations - Physicians who have taken combinations of examinations as set out in Rule .0215 of this Subchapter may be eligible to apply for a license by endorsement of credentials if they meet the score requirements of this Rule.

Statutory Authority G.S. 90-6; 90-10; 90-13.

**.0315 TEN YEAR QUALIFICATION**

(a) To be eligible for license by endorsement of credentials, an applicant who has not met one of the following qualifications within the past ten years of the date of the application to the Board, must take the SPEX, or other examination as determined by the Board, and attain a score of at least 75:

- (1) National Board of Medical Examiners certification;
- (2) FLEX Exam scores as required under Rule .0314 of this Section;
- (3) SPEX score of at least 75;
- (4) certification or re-certification from a specialty board recognized by the American Board of Medical Specialties; or
- (5) completion of formal postgraduate medical education as required under Rule .0313 of this Section; or
- (6) examination combinations as set out in Rule .0215 of this Subchapter.

~~(b) The SPEX requirement may be waived upon receipt of a current AMA Physician's Recognition Award.~~

~~(e) (b)~~ This requirement is in addition to all other requirements for licensure and may be applied as the Board deems appropriate.

*Statutory Authority G.S. 90-11; 90-13.*

**SUBCHAPTER 32C - PROFESSIONAL CORPORATIONS**

**.0003 PREREQUISITES FOR INCORPORATION**

(a) Before filing the articles of incorporation for a professional corporation with the Secretary of State, the incorporators shall file with the Executive Secretary of the Board:

- (1) the original articles of incorporation;
- (2) an additional executed copy of the articles of incorporation;
- (3) a copy of the articles of incorporation;
- (4) a registration fee of fifty dollars (\$50.00) set by Rule .0008 of this Section;
- (5) a certificate (P.C. Form 1) certified by all incorporators, setting forth the names and addresses of each person who will be employed by the corporation to practice medicine for the corporation, and stating that all such persons are duly licensed to practice medicine

in North Carolina, and representing that the corporation will be conducted in compliance with the Professional Corporation Act and these Rules;

(6) a certificate (P.C. Form 2) for the Executive Secretary or the Assistant Executive Secretary of the Board to sign certifying that at least one of the incorporators and each of the persons named as original shareholders is licensed to practice medicine in North Carolina.

(b) The Executive Secretary or Assistant Executive Secretary shall review the articles of incorporation for compliance with the laws relating to professional corporations and with these Rules. If they comply, the Executive Secretary or Assistant Executive Secretary shall sign P.C. Form 2 and return the original articles of incorporation and the copy to the incorporators for filing with the Secretary of State. The executed copy of the articles of incorporation shall be retained in the office of the Board. If the articles of incorporation are subsequently changed before they are filed with the Secretary of State, they shall be re-submitted to the Board and shall not be filed with the Secretary of State until approved by the Board.

*Statutory Authority G.S. 55B-4; 55B-10; 55B-12.*

**.0006 CHARTER AMENDMENTS AND STOCK TRANSFERS**

The following general provisions shall apply to all professional corporations to practice medicine:

- (1) All changes to the articles of incorporation of the corporation shall be filed with the Board for approval before being filed with the Secretary of State. A copy of the changes filed with the Secretary of State shall be sent to the Board within ten days after filing with the Secretary of State.
- (2) The Executive Secretary or Assistant Executive Secretary shall issue the certificate (P.C. Form 5) required by G.S. 55B-6 when stock is transferred in the corporation. P.C. Form 5 shall be permanently retained by the corporation. The stock books of the corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the Executive Secretary or his designee during business hours.

*Statutory Authority G.S. 55B-6; 55B-12.*

**T**he Rules Review Commission (RRC) objected to the following rules in accordance with G.S. 143B-30.2(c). State agencies are required to respond to RRC as provided in G.S. 143B-30.2(d).

**ADMINISTRATION****Motor Fleet Management Division***1 NCAC 38 .0205 - Accident Reporting**RRRC Objection 09/17/92***AGRICULTURE****Gasoline and Oil Inspection Board***2 NCAC 42 .0102 - Definitions**RRRC Objection 08/20/92**Agency Revised Rule**Obj. Removed 08/20/92**2 NCAC 42 .0801 - Purpose and Applicability**RRRC Objection 08/20/92**Agency Revised Rule**Obj. Removed 08/20/92***Structural Pest Control Division***2 NCAC 34 .0406 - Spill Control**RRRC Objection 07/16/92**Agency Responded**No Action 08/20/92**2 NCAC 34 .0603 - Waivers**RRRC Objection 07/16/92**Agency Responded**No Action 08/20/92**2 NCAC 34 .0902 - Financial Responsibility**RRRC Objection 07/16/92**Agency Responded**No Action 08/20/92***ECONOMIC AND COMMUNITY DEVELOPMENT****ABC Commission***4 NCAC 2R .0702 - Disciplinary Action of Employee**RRRC Objection 05/21/92**Rule Returned to Agency**06/18/92**4 NCAC 2R .1205 - Closing of Store**RRRC Objection 05/21/92**Agency Repealed Rule**Obj. Removed 06/18/92**4 NCAC 2S .0503 - Pre-Orders**RRRC Objection 05/21/92**Rule Returned to Agency**06/18/92***ENVIRONMENT, HEALTH, AND NATURAL RESOURCES****Coastal Management***15A NCAC 7H .0306 - General Use Standards for Ocean Hazard Areas**RRRC Objection 05/21/92**Rule Returned to Agency**06/18/92***Departmental Rules***15A NCAC 1J .0204 - Loans from Emergency Revolving Loan Accounts**RRRC Objection 06/18/92**15A NCAC 1J .0302 - General Provisions**RRRC Objection 06/18/92**15A NCAC 1J .0701 - Public Necessity: Health: Safety and Welfare**RRRC Objection 06/18/92*

**Environmental Health**

15A NCAC 18A .3101 - *Definitions* *Agency Revised Rule* *RRC Objection* 06/18/92  
*Obj. Removed* 06/18/92

**Environmental Management**

15A NCAC 2D .0538 - *Control of Ethylene Oxide Emissions* *Agency Revised Rule* *RRC Objection* 08/20/92  
*Obj. Removed* 08/20/92  
15A NCAC 2D .1104 - *Toxic Air Pollutant Guidelines* *Agency Revised Rule* *RRC Objection* 08/20/92  
*Obj. Removed* 08/20/92  
15A NCAC 2G .0601 - *The Aquatic Weed Control Act* *Agency Revised Rule* *RRC Objection* 08/20/92  
*Obj. Removed* 08/20/92  
15A NCAC 2O .0302 - *Self Insurance* *RRC Objection* 06/18/92

**Health: Epidemiology**

15A NCAC 19H .0402 - *Documentary Evidence: Facts to be Established* *Agency Revised Rule* *RRC Objection* 08/20/92  
*Obj. Removed* 08/20/92  
15A NCAC 19H .0601 - *Birth Certificates* *Agency Revised Rule* *RRC Objection* 06/18/92  
*Obj. Removed* 06/18/92

**Soil and Water Conservation**

15A NCAC 6E .0007 - *Cost Share Agreement* *Agency Revised Rule* *RRC Objection* 06/18/92  
*Obj. Removed* 06/18/92

**Wildlife Resources and Water Safety**

15A NCAC 10E .0004 - *Use of Areas Regulated* *Agency Revised Rule* *RRC Objection* 06/18/92  
*Obj. Removed* 08/20/92

**HUMAN RESOURCES****Aging**

10 NCAC 22R .0301 - *Definitions* *Agency Revised Rule* *RRC Objection* 07/16/92  
*Agency Revised Rule* *RRC Objection* 07/16/92  
*Obj. Removed* 08/20/92

**Day Care Rules**

10 NCAC 46D .0305 - *Administration of Program* *Agency Revised Rule* *RRC Objection* 06/18/92  
*Obj. Removed* 06/18/92  
10 NCAC 46D .0306 - *Records* *Agency Revised Rule* *RRC Objection* 06/18/92  
*Obj. Removed* 06/18/92

**Medical Assistance**

10 NCAC 50A .0305 - *Appeal Decision* *Agency Revised Rule* *RRC Objection* 08/20/92  
*Obj. Removed* 08/20/92

**Mental Health: General**

10 NCAC 14C .1010 - *Other Contracts* *RRC Objection* 08/20/92

<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	08/20/92
<i>10 NCAC 14C .1115 - Funding Group Homes for Mentally Retarded Adults</i>	<i>RRRC Objection</i>	08/20/92
<i>10 NCAC 14M .0704 - Program Director</i>	<i>RRRC Objection</i>	05/21/92
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/18/92

## **INSURANCE**

### **Departmental Rules**

<i>11 NCAC 1 .0106 - Organization of the Department</i>	<i>RRRC Objection</i>	06/18/92
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/18/92

### **Multiple Employer Welfare Arrangements**

<i>11 NCAC 18 .0019 - Description of Forms</i>	<i>RRRC Objection</i>	06/18/92
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### **Seniors' Health Insurance Information Program**

<i>11 NCAC 17 .0005 - SHIIP Inquiries to Insurers and Agents</i>	<i>RRRC Objection</i>	06/18/92
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## **LABOR**

### **Occupational Safety and Health Act**

<i>13 NCAC 7C .0108 - Building Code</i>	<i>RRRC Objection</i>	09/17/92
<i>13 NCAC 7C .0109 - Fire Prevention Code</i>	<i>RRRC Objection</i>	09/17/92

## **LICENSING BOARDS AND COMMISSIONS**

### **Dietetics/Nutrition**

<i>21 NCAC 17 .0014 - Code of Ethics for Professional Practice/Conduct</i>	<i>RRRC Objection</i>	05/21/92
<i>Agency Revised Rule</i>	<i>RRRC Objection</i>	05/21/92
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	06/18/92

### **General Contractors**

<i>21 NCAC 12 .0503 - Renewal of License</i>	<i>RRRC Objection</i>	08/20/92
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	08/20/92

## **REVENUE**

### **Individual Income, Inheritance and Gift Tax Division**

<i>17 NCAC 3B .0401 - Penalties</i>	<i>RRRC Objection</i>	08/20/92
<i>17 NCAC 3B .0402 - Interest</i>	<i>RRRC Objection</i>	08/20/92

### **Individual Income Tax Division**

<i>17 NCAC 6B .0107 - Extensions</i>	<i>RRRC Objection</i>	08/20/92
<i>17 NCAC 6B .0115 - Additions to Federal Taxable Income</i>	<i>RRRC Objection</i>	08/20/92
<i>17 NCAC 6B .0116 - Deductions from Federal Taxable Income</i>	<i>RRRC Objection</i>	08/20/92
<i>17 NCAC 6B .0117 - Transitional Adjustments</i>	<i>RRRC Objection</i>	08/20/92
<i>17 NCAC 6B .3406 - Refunds</i>	<i>RRRC Objection</i>	08/20/92

**STATE PERSONNEL****Office of State Personnel**

25 NCAC 1E .1301 - Purpose Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1E .1302 - Policy Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1E .1303 - Administration Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1E .1304 - Qualifying to Participate in Voluntary Shared Leave Prgm Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1E .1305 - Donor Guidelines Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1E .1306 - Leave Accounting Procedures Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1H .0603 - Special Recruiting Programs Agency Repealed Rule	<i>RRRC Objection</i>	05/21/92	
25 NCAC 1I .1702 - Employment of Relatives Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1I .1903 - Applicant Information and Application Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1I .2401 - System Portion I: Recruitment, Selection, & Advancement Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1I .2402 - System Portion II: Classification/Compensation Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1I .2403 - System Portion III: Training Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1I .2404 - System Portion IV: Employee Relations Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1I .2405 - System Portion V: Equal Emp Oppty/Affirmative Action Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1I .2406 - System Portion VI: Political Activity Agency Revised Rule	<i>RRRC Objection</i>	07/16/92	
25 NCAC 1J .1005 - Eligibility for Services Agency Revised Rule	<i>RRRC Objection</i>	05/21/92	
		<i>Obj. Removed</i>	06/18/92

**TRANSPORTATION****Division of Highways**

19A NCAC 2B .0164 - Use of Right of Way Consultants	<i>RRRC Objection</i>	09/17/92
19A NCAC 2B .0165 - Asbestos Contracts with Private Firms	<i>RRRC Objection</i>	08/20/92

**T**his Section of the Register lists the recent decisions issued by the North Carolina Supreme Court, Court of Appeals, Superior Court (when available), and the Office of Administrative Hearings which invalidate a rule in the North Carolina Administrative Code.

#### **1 NCAC 5A .0010 - ADMINISTRATIVE PROCEDURES**

Thomas R. West, Administrative Law Judge with the Office of Administrative Hearings, declared two portions of Rule 1 NCAC 5A .0010 void as applied in *Stauffer Information Systems, Petitioner v. The North Carolina Department of Community Colleges and The North Carolina Department of Administration, Respondent and The University of Southern California, Intervenor-Respondent* (92 DOA 0666).

#### **15A NCAC 19A .0202(d)(10) - CONTROL MEASURES - HIV**

Brenda B. Becton, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 19A .0202(d)(10) void as applied in *ACT-UP TRIANGLE (AIDS Coalition to Unleash Power Triangle), Steven Harris, and John Doe, Petitioners v. Commission for Health Services of the State of North Carolina, Ron Levine, as Assistant Secretary of Health and State Health Director for the Department of Environment, Health, and Natural Resources of the State of North Carolina, William Cobey, as Secretary of the Department of Environment, Health, and Natural Resources of the State of North Carolina, Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the North Carolina Department of Environment, Health, and Natural Resources, Wayne Bobbitt Jr., as Chief of the HIV/STD Control Branch of the North Carolina Department of Environment, Health, and Natural Resources, Respondents* (91 EHR 0818).

**T**his Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698.

## KEY TO CASE CODES

ABC	Alcoholic Beverage Control Commission	DST	Department of State Treasurer
BDA	Board of Dental Examiners	EDC	Department of Public Instruction
BME	Board of Medical Examiners	EHR	Department of Environment, Health, and Natural Resources
BMS	Board of Mortuary Science	ESC	Employment Security Commission
BOG	Board of Geologists	HAF	Hearing Aid Dealers and Fitters Board
BON	Board of Nursing	HRC	Human Relations Committee
BOO	Board of Opticians	IND	Independent Agencies
CFA	Commission for Auctioneers	INS	Department of Insurance
COM	Department of Economic and Community Development	LBC	Licensing Board for Contractors
CPS	Department of Crime Control and Public Safety	MLK	Milk Commission
CSE	Child Support Enforcement	NHA	Board of Nursing Home Administrators
DAG	Department of Agriculture	OAH	Office of Administrative Hearings
DCC	Department of Community Colleges	OSP	Office of State Personnel
DCR	Department of Cultural Resources	PHC	Board of Plumbing and Heating Contractors
DCS	Distribution Child Support	POD	Board of Podiatry Examiners
DHR	Department of Human Resources	SOS	Department of Secretary of State
DOA	Department of Administration	SPA	Board of Examiners of Speech and Language Pathologists and Audiologists
DOJ	Department of Justice	WRC	Wildlife Resources Commission
DOL	Department of Labor		
DSA	Department of State Auditor		

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Anne R. Gwaltney, Milton H. Askew, Jr. and Anna L. Askew v. EHR and Pamlico County Health Department	89 DHR 0699	Reilly	07/17/92
Eleanor R. Edgerton-Taylor v. Cumberland County Department of Social Services	89 OSP 1141	Morrison	08/18/92
Annette Carlton v. Cleveland County Department of Social Services	90 OSP 0024	Chess	08/14/92
Janice Parker Haughton v. Halifax County Mental Health, Mental Retardation, Substance Abuse Program	90 OSP 0221	West	08/18/92

**CONTESTED CASE DECISIONS**

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Carolina Water Service, Inc. v. EHR, Division of Environmental Management	90 EHR 0415	West	09/11/92
CSX Transportation, Inc. v. Department of Environment, Health, & Natural Resources	90 EHR 0628	Reilly	07/17/92
Bruce Keeter v. Beaufort County Health Department	90 EHR 0666	Morgan	07/28/92
Christine Hill v. Crime Victims Compensation Commission	90 CPS 0876	Morgan	08/24/92
JHY Concord, Inc. v. Department of Labor	90 DOL 1421	Morgan	07/28/92
Lick Fork Hills, Inc., Marion Bagwell, President v. Department of Environment, Health, & Natural Resources	91 EHR 0023	Morgan	07/28/92
Albert J. Johnson v. N.C. Victims Compensation Commission	91 CPS 0038	Morgan	07/28/92
Frank Beal, T/A Wild Wild West v. Alcoholic Beverage Control Commission	91 ABC 0164	Morgan	09/10/92
William B. Holden v. Department of Environment, Health, & Natural Resources	91 EHR 0176	Morgan	08/18/92
Brenda P. Price v. North Carolina Central University	91 OSP 0219	Morrison	08/21/92
Century Care of Laurinburg, Inc. v. DHR, Division of Facility Services, Licensure Section	91 DHR 0257	West	06/30/92
Richard L. Gainey v. Department of Justice	91 OSP 0341	Becton	08/10/92
Wade Charles Brown, Jr. v. N.C. Crime Victims Compensation Commission	91 CPS 0345	Chess	07/08/92
Jackie Bruce Edwards v. DHR, Western Carolina Center	91 OSP 0354	West	08/20/92

**CONTESTED CASE DECISIONS**

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Robert C. Howell v. Department of Correction	91 OSP 0407	Morgan	08/26/92
Charles E. Roe v. Department of Environment, Health, & Natural Resources	91 OSP 0520	Nesnow	07/23/92
Jerry J. Parker v. Department of Correction	91 OSP 0546	Morgan	08/26/92
Air-A-Plane Corporation v. Department of Environment, Health, & Natural Resources	91 EHR 0636	Nesnow	09/04/92
Lisa M. Reichstein v. Office of Student Financial Aid, East Carolina University	91 OSP 0662	Nesnow	06/24/92
Hudson's "The Acres" Rest Home v. DHR, Division of Facility Services, Licensure Section	91 DHR 0665	Chess	09/09/92
DHR, Division of Facility Svcs, Child Day Care Section v. Mary Goodwin, Jean Dodd, D/B/A Capital City Day Care Center	91 DHR 0720	Morgan	07/30/92
Kenneth Helms v. Department of Human Resources	91 OSP 0729	Chess	07/15/92
Lloyd C. Neely v. Department of Correction	91 OSP 0756	Morgan	09/10/92
Alcoholic Beverage Control Commission v. Daniels Investments, Inc., t/a Leather & Lace - East 4205 Monroe Road, Charlotte, N.C. 28205	91 ABC 0799	Mann	07/14/92
Zelma Babson v. Brunswick County Health Department	91 OSP 0804	Gray	08/14/92

**CONTESTED CASE DECISIONS**

CASE NAME	CASE NUMBER	ALJ	FILED DATE
ACT-UP Triangle (AIDS Coalition to Unleash Power Triangle, Steven Harris, and John Doe v. Commission for Health Services of the State of N.C., Ron Levine, as Assistant Secretary of Health and State Health Director for EHR of the State of N.C., William Cobey, as Secretary of EHR of the State of N.C., Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the N.C. EHR, Wayne Bobbitt, Jr., as Chief of the HIV/STD Control Branch of the N.C.EHR	91 EHR 0818	Becton	07/08/92
Jane C. O'Malley, Melvin L. Cartwright v. EHR and District Health Department Pasquotank-Perquimans-Camden-Chowan	91 EHR 0838	Becton	07/02/92
Thomas E. Vass v. James E. Long, Department of Insurance	91 INS 0876	Morrison	08/14/92
William Paul Fearrington v. University of North Carolina at Chapel Hill	91 OSP 0905	Reilly	08/28/92
Gerald R. Pruitt v. Department of Correction	91 OSP 0933	Gray	09/14/92
Grotgen Nursing Home, Inc., Britthaven, Inc. v. Certificate of Need Section, Div of Facility Svcs, DHR	91 DHR 0964 91 DHR 0966	Nesnow	07/06/92
Ramona S. Smith, R.N. v. N.C. Teachers'/St Emps' Comp Major Medical Plan	91 DST 0984	Chess	06/18/92
Jarrett Dennis Swarengin v. DHR, Division of Social Services, CSE	91 CSE 0986	Becton	09/14/92
Charles H. Yates, Power of Attorney for Ruth Yates v. N.C. Teachers'/St Emps' Comp Major Medical Plan	91 INS 1008	Reilly	08/21/92
Walter McGlone v. DHR, Division of Social Services, CSE	91 CSE 1030	Morrison	07/13/92
William Oscar Smith v. DHR, Division of Social Services, CSE	91 CSE 1042	Gray	07/24/92
William Watson v. DHR, Division of Social Services, CSE	91 CSE 1047	Becton	07/08/92

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Robert D. Daniels Jr. v. DHR, Division of Social Services, CSE	91 CSE 1048	Morrison	08/27/92
Marie McNeill-Pridgen v. Department of Environment, Health, & Natural Resources	91 EHR 1059	Nesnow	07/17/92
Catawba Memorial Hospital v. DHR, Div of Facility Svcs, Certificate of Need Section and Frye Regional Medical Ctr, Inc. and Amireit (Frye), Inc. and Thoms Rehabilitation Hospital Health Services Corp. and Frye Regional Medical Ctr, Inc. and Amireit (Frye), Inc. v. DHR, Div of Facility Svcs, Certificate of Need Section and Thoms Rehabilitation Hospital Health Services Corp. and Catawba Memorial Hospital	91 DHR 1061 91 DHR 1087	Reilly	07/13/92
Edward R. Peele v. Sheriffs' Education & Training Stds. Commission	91 DOJ 1092	Morrison	08/18/92
Charles Lawton Roberts v. DHR, Division of Social Services, CSE	91 CSE 1097	Becton	09/14/92
William Torres v. Dept of Justice, Lacy H. Thornburg, Attorney General	91 DOJ 1098	Morrison	08/07/92
Wade A. Burgess v. DHR, Division of Social Services, CSE	91 CSE 1114	Gray	07/01/92
Sammie L. Anderson v. DHR, Division of Social Services, CSE	91 CSE 1155	Mann	09/01/92
Harry L. King v. Department of Transportation	91 OSP 1162	Morgan	07/13/92
Gilbert Lockhart v. DHR, Division of Social Services, CSE	91 CSE 1178	Morrison	07/30/92
Isaac H. Galloway v. DHR, Division of Social Services, CSE	91 CSE 1190	Reilly	06/30/92

**CONTESTED CASE DECISIONS**

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Russell A. Barclift v. DHR, Division of Social Services, CSE	91 CSE 1207 92 CSE 0275	Reilly	06/30/92
Barnabas D. Frederick v. DHR, Division of Social Services, CSE	91 CSE 1216	Nesnow	09/15/92
Herman Edward Main II v. DHR, Division of Social Services, CSE	91 CSE 1225	Nesnow	07/07/92
Albert Louis Stoner III v. DHR, Division of Social Services, CSE	91 CSE 1244	Gray	07/01/92
James E. Greene v. DHR, Division of Social Services, CSE	91 CSE 1245	Nesnow	07/14/92
Joseph W. Harris v. DHR, Division of Social Services, CSE	91 CSE 1247	Morgan	07/28/92
Celvis M. Burns v. DHR, Division of Social Services, CSE	91 CSE 1256	Mann	09/01/92
Rodney Powell v. DHR, Division of Social Services, CSE	91 CSE 1257	Morgan	07/29/92
Miles G. Griffin Jr. v. DHR, Division of Social Services, CSE	91 CSE 1270	Gray	08/27/92
Gerald E. Anthony v. DHR, Division of Social Services, CSE	91 CSE 1274	Mann	09/01/92
Floyd L. Rountree v. DHR, Division of Social Services, CSE	91 CSE 1275	Morgan	07/22/92
Ruth Smith Hensley Shondales v. ABC Commission	91 ABC 1280	Chess	08/05/92
Rasoul Behboudi v. DHR, Division of Social Services, CSE	91 CSE 1313	Morrison	09/15/92
City-Wide Asphalt Paving, Inc. v. Department of Environment, Health, & Natural Resources	91 EHR 1360	Chess	07/01/92

**CONTESTED CASE DECISIONS**

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Alcoholic Beverage Control Commission v. Tre Three, Inc., T/A Crackers, Airport Rd., Rockingham, NC 28379	91 ABC 1372	Chess	07/07/92
Alcoholic Beverage Control Commission v. Rode Enterprises, Inc., T/A Jordan Dam Mini Mart	91 ABC 1388	Gray	07/30/92
Blythe M. Bragg v. University of North Carolina at Chapel Hill	91 OSP 1421	Nesnow	09/08/92
David W. Williams v. DHR, Division of Social Services, CSE	91 CSE 1423	Morrison	09/10/92
Donald R. Allison v. DHR, Caswell Center	91 OSP 1427	Reilly	06/30/92
Alfred Rees v. Department of Environment, Health, & Natural Resources	92 EHR 0004	Reilly	09/03/92
Mrs. S. v. Washington County Board of Education	92 EDC 0023	Mann	08/28/92
Rudolph Tripp v. Department of Correction	92 OSP 0024	Gray	08/27/92
Lavern Fesperman v. Mecklenburg County	92 OSP 0030	Chess	07/17/92
Paul J. Nonkes v. Halifax County Health Dept. (Jeff Dillard, Sanitarian)	92 EHR 0058	Becton	08/28/92
Carrolton of Williamston, Inc. v. DHR, Division of Facility Services, Licensure Section	92 DHR 0071	Becton	08/19/92
Fred Jennings Moody Jr. v. Sheriffs' Education & Training Stds. Commission	92 DOJ 0084	Chess	07/17/92
Ronnie Lamont Donaldson v. Sheriffs' Education & Training Standards Commission	92 DOJ 0092	Reilly	07/27/92
Vernice V. Battle v. Sheriffs' Education & Training Standards Commission	92 DOJ 0093	Becton	08/28/92

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Hudson's "The Acres" Rest Home v. DHR, Division of Facility Services, Licensure Section	92 DHR 0100	Chess	09/04/92
Marvin Helton, Jean Helton v. DHR, Division of Facility Services	92 DHR 0102	Chess	08/14/92
Leo Scott Wilson v. Department of Environment, Health, & Natural Resources	92 EHR 0112	Reilly	08/26/92
Peggy N. Barber v. The University of North Carolina at Chapel Hill	92 OSP 0120	Reilly	07/13/92
Alcoholic Beverage Control Commission v. John Wade Lewis, t/a Tasty Grill	92 ABC 0145	Nesnow	07/15/92
Licensing Board for General Contractors v. Wright's Construction, Inc. (Lic. No. 23065)	92 LBC 0172	Gray	07/31/92
Richard L. Banks v. Pasquotank-Perquimans-Camden-Chowan District Health Department (PPCC) & Department of Environment, Health, & Natural Resources	92 EHR 0175	West	08/25/92
Hudson's "The Acres" Rest Home v. DHR, Division of Facility Services, Licensure Section	92 DHR 0186	Chess	09/04/92
Ray Bryant v. Department of Labor, OSHA	92 DOL 0187	Nesnow	08/07/92
Herbert Hines Jr., H & H v. Alcoholic Beverage Control Commission	92 ABC 0189	Becton	07/22/92
William Stevenson v. Department of Correction	92 OSP 0201	Chess	09/03/92
Frances B. Billingsley v. Bd. of Trustees/Teachers & St Employees Retirement Sys	92 DST 0205	Morgan	08/18/92
Glenn E. Myers v. Department of Correction	92 OSP 0217	Reilly	09/14/92

**CONTESTED CASE DECISIONS**

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Lawrence Neal Murrill T/A Knox, 507 1st St SW, Hickory, NC 28602 v. Alcoholic Beverage Control Commission	92 ABC 0220	Chess	08/03/92
Town of Denton v. Department of Environment, Health, & Natural Resources	92 EHR 0241	Reilly	07/30/92
Alcoholic Beverage Control Commission v. Byrum's of Park Road, Inc., T/A Byrum's Restaurant	92 ABC 0252	Gray	07/30/92
Alcoholic Beverage Control Commission v. Leo's Delicatessen #2, Inc., T/A Leo's #2	92 ABC 0255	Gray	07/30/92
North Topsail Water & Sewer, Inc. v. Department of Environment, Health, & Natural Resources	92 EHR 0266	Morrison	08/12/92
Henry Thomas Tart v. DHR, Division of Social Services, CSE	92 CSE 0283	Nesnow	09/15/92
Henry Lane, D/B/A Emerald Health Care Acute Care Ctr v. DHR, Div of Facility Services, Certificate of Need Section and Bowman-Richardson Health Care, Inc. D/B/A Wilkes Senior Village	92 DHR 0308	Gray	08/28/92
Gerald G. Strickland v. Crime Control and Public Safety	92 CPS 0320	Chess	09/10/92
Jonathan L. Fann v. U.N.C. Physical Plant, Herb Paul, Louis Herndon, Dean Justice, Bruce Jones	92 OSP 0363	Becton	08/19/92
Douglas A. Bordeaux v. Department of Correction	92 OSP 0378	Chess	07/10/92
Clifton R. Johnson v. O'Berry Center, Department of Human Resources	92 OSP 0381	West	07/08/92
Southeastern Machine & Tool Company, Inc. v. Department of Environment, Health, & Natural Resources	92 EHR 0386	Becton	07/20/92
Louvenia Clark v. Edgecombe County Department of Social Services	92 OSP 0402	Reilly	08/21/92

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Raleigh F. LaRoche v. Child & Family Services of Wake County	92 OSP 0409	Becton	08/24/92
Paul Reeves, Youth University Child Care v. Child Day Care Section, Division of Facility Svcs	92 DHR 0424	West	08/21/92
Mr. & Mrs. James C. Stanton v. Charlotte-Mecklenburg School System	92 EDC 0430	Nesnow	08/04/92
James Cooper Lewis v. Sheriffs' Education & Training Standards Commission	92 DOJ 0461	Reilly	09/15/92
Jon David Amundson v. Davidson County Mental Health	92 OSP 0503	Becton	09/10/92
Northview Mobile Home Park v. Department of Environment, Health, & Natural Resources	92 EHR 0507	Reilly	07/13/92
Yolanda Lynn Bethea v. DHR, Division of Social Services, CSE	92 DCS 0513	Becton	08/14/92
Alice Hunt Davis v. Department of Human Resources	92 OSP 0526	West	07/16/92
Jimmy F. Bailey Sr. v. Department of State Treasurer, Retirement Systems Div	92 DST 0536	Morgan	08/18/92
Bramar, Inc., t/a Spike's v. Alcoholic Beverage Control Commission	92 ABC 0554	Mann	08/13/92
Ralph J. Ogburn v. Private Protective Services Board	92 DOJ 0571	Nesnow	08/07/92
Gilbert Todd Sr. v. Public Water Supply Section	92 EHR 0586	Morrison	08/06/92
Candance Y. Johnson v. Division of Motor Vehicles	92 DOT 0589	Becton	08/24/92
John W. Surles v. N.C. Crime Victims Compensation Commission	92 CPS 0595	Reilly	07/13/92

**CONTESTED CASE DECISIONS**

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Pamela Jean Gass v. DHR, Division of Social Services, CSE	92 DCS 0623	Morrison	08/14/92
J.W. Reed v. Department of Correction	92 OSP 0638	Morrison	08/11/92
Carson Davis v. Department of Correction	92 OSP 0650	Reilly	08/10/92
Luther Hall Clontz v. Western Carolina Center (NC of Human Resources)	92 OSP 0652	Becton	09/10/92
Private Protective Services Board v. Mark Andrew Perry	92 DOJ 0662	Becton	09/10/92
Stauffer Information Systems v. Department of Community Colleges and the N.C. Department of Administration and The University of Southern California	92 DOA 0666	West	07/08/92
Nancy J. Tice v. Administrative Off of the Courts, Guardian Ad Litem Svcs	92 OSP 0674	Morrison	08/11/92
L. Stan Bailey v. Chancellor Moran and UNC-Greensboro	92 OSP 0679	West	07/10/92
Arnold McCloud T/A Club Castle v. Alcoholic Beverage Control Commission	92 ABC 0681	Morrison	07/25/92
Joyce Faircloth, T/A Showcase Lounge v. Alcoholic Beverage Control Commission	92 ABC 0713	Morrison	07/25/92
James B. Price v. Department of Transportation	92 OSP 0725	Mann	09/02/92
Edmonia Lang v. Carteret County Board of Education	92 OSP 0736	Mann	08/28/92
Larry Bruce High v. Alarms Systems Licensing Board	92 DOJ 0755 92 DOJ 0785	Nesnow	08/25/92

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Daniel N. Jones v. N.C. Victims Compensation Commission	92 CPS 0879	Chess	08/28/92

**STATE OF NORTH CAROLINA**

**COUNTY OF JOHNSTON**

**IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
90 EHR 0415**

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<b>CAROLINA WATER SERVICE, INC.</b>	)
Petitioner	)
	)
v.	)
	)
<b>NORTH CAROLINA DEPARTMENT OF</b>	)
<b>ENVIRONMENT, HEALTH AND</b>	)
<b>NATURAL RESOURCES, DIVISION OF</b>	)
<b>ENVIRONMENTAL MANAGEMENT</b>	)
Respondent	)

**RECOMMENDED DECISION**

The above-captioned matter was heard by Thomas R. West, Administrative Law Judge, on February 3, 1992, in Raleigh, North Carolina.

**APPEARANCES**

**For Petitioner:**      Edward S. Finley, Jr., James L. Hunt, Hunton and Williams

**For Respondent:**      Elizabeth Rouse Mosley, Associate Attorney General

**ISSUES**

1.      Whether the Respondent (DEM) lacked authority or acted arbitrarily or capriciously in setting a total phosphorus limit at 0.1 mg/l, including the use of the "Mass Balance Model," for effluent discharges of 250,000 gallons per day (gpd) and 500,000 gpd.

2.      Whether the Respondent lacked authority or acted arbitrarily or capriciously in requiring Petitioner to take daily downstream samples at the spillway of Austin Pond.

**STIPULATED FACTS**

The parties stipulated in the Final Prehearing Order that the following facts are true:

1.      On August 14, 1989, the Petitioner (CWS) filed an application with the Respondent to renew an existing National Pollution Discharge Elimination System (NPDES) permit to operate a surface discharge wastewater treatment plant in the White Oak Subdivision of Johnston County.

2.      Petitioner's previous NPDES permit, dated September 2, 1988, allowed Petitioner (1) to operate an existing 50,000 gpd wastewater facility, (2) to expand this plant to 140,000 gpd after receiving appropriate Authorization to Construct, and (3) after receiving appropriate Authorization to Construct, to build and operate a 500,000 gpd facility at a separate outfall on White Oak Creek. The permit did not contain any limitations on total phosphorus discharge.

3.      Petitioner's system was first permitted to then owner, White Oak Plantation, Inc. ("White Oak Plantation"), in February, 1985. The initial permit set an effluent limit of 50,000 gpd. In September, 1986,

White Oak Plantation applied for and received a modified permit allowing an immediate effluent flow of up to 50,000 gpd, with stepwise increases to 140,000 gpd and 500,000 gpd. In January, 1987, White Oak Plantation received a third permit, which allowed it (1) to continue to operate the existing 50,000 gpd facility, (2) after receiving Authorization to Construct from DEM, to expand the existing plant to a 140,000 gpd facility, and (3) after receiving Authorization to Construct from DEM, to build a separate facility with design capacity of 500,000 gpd. The 1985, 1986, and 1987 permits did not contain any limitations on total phosphorus discharge.

4. At latitude 353850, longitude 783121, the summer 7Q10 of White Oak Creek is 0.10 cfs, the winter 7Q10 of White Oak Creek is 0.82 cfs, and the average stream flow of White Oak Creek is 10.00 cfs.

5. On March 19, 1990, the Respondent issued a permit which allowed Petitioner to continue to operate the existing 50,000 gpd plant at White Oak. This permit provided for two possible discharge points: (1) at the existing site on an unnamed tributary to White Oak Creek, and (2) to a new outfall on White Oak Creek proper. The permit eliminated the stepwise increases to 140,000 gpd and 500,000 gpd contained in the 1986, 1987, and 1988 permits.

6. On April 23, 1990, the Petitioner filed its petition for a contested case.

7. After settlement negotiations, Respondent and Petitioner agreed that the permit submitted March 19, 1990, could be issued with the following additional conditions:

- a. Stepwise increases, after issuance of authorization to Construct, would allow effluent discharges of 250,000 gpd and 500,000 gpd.
- b. Permit issuance is subject to public review via standard public noticing procedures.
- c. Permittee will provide an on-site operator with appropriate educational and certification requirements for daily operation and maintenance checks on the proposed, highly advanced waste treatment plant (i.e., for the 250,000 and 500,000 gpd discharges). Effluent total phosphorus (TP) concentrations should be measured on a daily basis, as should the other parameters typically included for a Class III facility (with one site exception).
- d. Permittee agrees to relocate the WWTP outfall pipe (for the 250,000 gpd and 500,000 gpd facilities) to White Oak Creek at a distance of approximately 1.5 miles above Austin Pond at a latitude of 353850 and a longitude of 783121 (original permitted site).
- e. Permittee agrees to perform instream monitoring to provide information deemed necessary by the Division (with one site exception) to evaluate instream impacts related to the facility's discharge. A reopen clause will be placed in the permit to allow for permit revision or revocation upon demonstration of significant instream water quality impacts (i.e., frequent or severe water quality standard violations).
- f. Permittee must provide a sludge management plan (including details regarding quantity, handling and disposal) for approval by DEM prior to NPDES permit issuance for the expanded flows.
- g. Permittee shall provide dual path treatment and stand-by power or other equivalent reliability measures as approved by the Division.

### **FINDINGS OF FACT**

Based upon the evidence admitted at the hearing, the undersigned Administrative Law Judge finds the following facts:

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1. CWS operates approximately 35 sewage treatment plants in North Carolina, including the plant at White Oak.

2. White Oak is a residential subdivision in Johnston County with about 123 single family homes.

3. When CWS purchased the water and sewer system at White Oak in January, 1988, CWS obtained a copy of the existing NPDES permit. CWS paid \$50,000 for the White Oak system. CWS promised the developer that it would provide sewer service to the entire 1,000 acres in the White Oak tract. In order to serve the entire tract, CWS will require a permit with a greater than 50,000 gpd effluent limit.

4. CWS was required to obtain a Certificate of Public Convenience and Necessity from the North Carolina Utilities Commission before it could purchase and operate the facility. CWS has received a Certificate of Public Convenience and Necessity from the Utilities Commission to operate the White Oak facility.

5. Since purchasing the system, CWS has improved the sewage treatment facilities. At the time of purchase, the tertiary filter at the plant was off-line, only one of the two blowers was operational, and the surge tank was not operating properly. After CWS' purchase, however, a DEM inspection in March, 1989, indicated that the system was in total compliance with all effluent limitations and monitoring requirements. The regional water quality supervisor for the Raleigh district reported on April 18, 1989, that the facility was well maintained and operated.

6. When CWS first obtained the permit for the White Oak facility in September, 1988, no issues were raised that suggested DEM should change the existing effluent limitations.

7. Part III of Petitioner's September 2, 1988, NPDES permit stated that "Upon expiration of this permit [January 31, 1990], the permit shall be renewed with a phosphorous limit of 2.0 milligrams per liter for the 0.500 MGD phase of the treatment plant. This limitation must be met by May 1, 1993, or upon the start-up of the 0.500 MGD phase of the treatment plant after May 1, 1993." As a result, in 1988, DEM issued a permit to Petitioner stating that upon expiration of that permit, the permit would be renewed with a phosphorus limit significantly higher than sought by Petitioner in this contested case.

8. DEM did not inform CWS, in writing, until July 26, 1990, that the reason it had denied CWS' application was because of the potential for excessive eutrophication of the downstream Austin Pond. DEM indicated, at that time, that a reduction of total phosphorus to 0.5 mg/l was the maximum level that DEM considered reasonably achievable.

9. DEM has indicated that its concern in this case was, and is, the potential impact on Austin Pond as opposed to White Oak Creek.

10. CWS did not apply for an "expanded" effluent discharge in the contested permit. Since 1986, the permits for White Oak have allowed discharges of up to 500,000 gpd, the same amount requested by CWS in this case. On the other hand, DEM seeks to reduce the effluent flow previously allowed CWS at White Oak.

11. After CWS filed a contested case, DEM indicated that it did not believe CWS could meet a proposed phosphorus standard of 0.1 mg/l phosphorus.

12. CWS submitted engineering information and other data which helped persuade DEM that CWS could meet a proposed phosphorus standard of 0.1 mg/l phosphorus.

13. In this proceeding, CWS has stipulated that it would agree to reduce the level of phosphorus discharge to 0.5 mg/l at 250,000 gpd and 0.2 mg/l at 500,000 gpd. A CWS affiliate has consistently met

a 0.18 mg/1 phosphorus standard at a wastewater treatment plant in Virginia.

14. The proposed discharge point on White Oak Creek proper is roughly 1.5 miles above the headwaters of Austin Pond.

15. Just below the proposed discharge point, but above Austin Pond, the White Oak Creek traverses a swampy area.

16. The water quality standards in Austin Pond at issue in this case are: chlorophyll a, dissolved oxygen, and dissolved gases.

17. CWS presented the testimony of Dr. Clifford W. Randall, a chaired professor of civil engineering and Chairman of the Environmental Engineering and Sciences Program at Virginia Polytechnic Institute and State University. Dr. Randall is director of the Occoquan Watershed Monitoring program and was appointed to the executive committee of the Chesapeake Bay Water Quality Project, both of which are eutrophication control programs. Dr. Randall has extensive experience in designing wastewater treatment plants. Dr. Randall was named "Conservationist of the Year" by the Chesapeake Bay Foundation for his efforts to prevent nutrient pollution in Chesapeake Bay. Dr. Randall has published a large number of works on phosphorus removal and on the science of eutrophication. Dr. Randall is an expert on the subjects of eutrophication, water pollution, water treatment and nutrient removal.

18. In preparing for testimony, Dr. Randall reviewed the existing and proposed NPDES permits for White Oak Creek, the wasteload allocation procedures of DEM, and inspected the treatment plant at White Oak and Austin Pond.

19. Eutrophication is the excessive fertilization of a body of water which results in rapid growth of plants such as algae and rooted aquatic vegetation.

20. In order for accelerated eutrophication to occur in impounded waters, including Austin Pond, nutrients such as phosphorus must be present. Sunlight and favorable temperatures are also necessary for accelerated eutrophication. Other factors include the depth of the impoundment, the shape and size of the impoundment, and the retention time of water in the impoundment. Wastewater discharges contain phosphorus.

21. Wastewater plants are capable of removing large amounts of phosphorus before discharge into receiving waters. Phosphorus removal processes can consist of biological removal, chemical additions, and filters. Phosphorus levels can be reduced to 0.35 mg/1 without any chemical addition. Technology exists to reduce phosphorus levels below 0.1 mg/1.

22. Only about two to three percent in expense would be added to the cost of a plant to comply with phosphorus limits of about 0.35 mg/1. To reach phosphorus limits of about 0.10 mg/1, however, the cost of the plant would be increased by about seventy percent, and the operating costs of the plant would be increased by about one hundred percent.

23. CWS' rates and charges are established by the North Carolina Utilities Commission. The increased costs of differing levels of phosphorus removal would likely be passed directly to CWS' North Carolina customers.

24. The "Vollenweider Model" is a predictive device used to determine the likelihood of excessive eutrophication. The model uses as variables the amount of phosphorus loading into an impoundment and the retention time of water in the subject impoundment. Although the use of the Vollenweider Model appears to be erroneous because it utilizes annual phosphorus loading and does not account for low stream levels during the warmest weeks of the year, the Vollenweider model has been found to accurately predict eutrophication in impoundments in North America and in Europe, including lakes in North Carolina, Georgia, Tennessee and Florida. The Vollenweider Model is an accepted method in the scientific community in predicting

eutrophication in impoundments such as Austin Pond and has been endorsed by the EPA. The Vollenweider criteria are empirically related to eutrophication in lakes in the southeastern United States.

25. No eutrophic conditions at Austin Pond are predicted by the Vollenweider Model if the phosphorus discharge does not exceed 0.5 mg/l at 250,000 gpd or 0.2 mg/l at 500,000 gpd.

26. Several variables not addressed by the Vollenweider Model suggest that under the facts in this case eutrophication in Austin Pond is even less likely than predicted by the Vollenweider Model. Normal in-stream processes tend to remove phosphorus from a stream. The upstream swamp can absorb much of the discharged phosphorus. Eutrophication is less likely in a small pond because of the shallowness of the pond and the shorter water retention time.

27. Phosphorus levels in Austin Pond will not generate eutrophic conditions if the phosphorus discharge from Petitioner's plant does not exceed 0.5 mg/l at 250,000 gpd or 0.2 mg/l at 500,000 gpd.

28. There is currently no excessive eutrophication in Austin Pond.

29. The phosphorus concentrations in White Oak Creek will actually be reduced from those currently permitted by DEM at discharge levels of 250,000 gpd and 500,000 gpd under the limitations proposed by the Petitioner.

30. DEM did not utilize the Vollenweider Model.

31. Although DEM's use of the 7Q10 of White Oak Creek in determining that phosphorus limits above 0.1 mg/l would permit eutrophication of Austin Pond appears to be logical, DEM's analyses of the potential for eutrophication in Austin Pond were flawed in several respects.

32. DEM's use of the 7Q10 for White Oak Creek erroneously assumes that attainment of 0.1 mg/l total phosphorus in White Oak Creek is necessary to prevent eutrophication. The waters of White Oak Creek flow into Austin Pond, thereby mixing the creek water with pond water which contain substantially lower levels of phosphorus per liter.

33. The retention time of water in Austin Pond is greater than seven days. It is, therefore, not logical to use the 7Q10 figure for White Oak Creek to measure phosphorus concentrations in an entirely separate body of water, Austin Pond.

34. DEM's reliance on a 0.1 mg/l phosphorus target for Austin Pond is inappropriate. A level of 0.1 mg/l phosphorus has been correlated with eutrophic conditions in only one of at least four DEM studies of large lakes. In that one instance, the 0.1 mg/l measurement was taken while algae were in bloom. A correct correlation between chlorophyll a and phosphorus concentrations cannot be made in an algae bloom. Moreover, the DEM study that obtained a 0.1 mg/l measurement was made downstream of a discharge of millions of gallons of wastewater in the Eno River not subject to any phosphorus restrictions.

35. DEM's assumption that a localized zone in a large lake is analogous to Austin Pond is without basis in fact.

36. The mass balance model is designed to measure phosphorus concentrations in a stream and not in an impoundment. DEM did not use the mass balance model in an appropriate manner.

37. The mass balance model as used by DEM does not determine the likelihood of eutrophication under 7Q10 conditions in Austin Pond in a reliable manner.

38. DEM did not collect actual in-pond data at Austin Pond.

39. Petitioner will decrease the loading of phosphorus into Austin Pond at the levels it seeks

compared to the levels now permitted by DEM.

40. DEM's decision not to grant the permit at issue is inconsistent with other similar permitting decisions.

41. DEM has never imposed a 0.1 mg/l standard on an expanding plant, even for plants discharging into lake headwaters tested by DEM for eutrophication. This includes the 4.14 MGD Henderson plant at Nutbush Creek, effluent from which is dominating the stream and is affecting Kerr Lake. DEM's testimony indicated that it was willing to permit an expansion for this plant with phosphorus concentrations more than five times the alleged 0.1 mg/l standard.

42. There is no evidence that CWS has legal access to the land surrounding Austin Pond, including land adjacent to the pond's spillway. Indeed, the only evidence is that the pond and the land surrounding it are privately owned.

43. There is no evidence that CWS has been permitted or invited to enter the land surrounding Austin Pond.

### **CONCLUSIONS OF LAW**

1. CWS' certificate of public convenience and necessity issued by the North Carolina Utilities Commission gives CWS a monopoly to provide private sewer service in White Oak. The certificate requires CWS to provide reasonable service to every customer in the 1,000 acre White Oak tract.

2. North Carolina dischargers to surface waters are required to obtain permits from DEM before discharging wastewater.

3. DEM acted erroneously, arbitrarily, and capriciously in denying the permit with phosphorus limits of 0.5 mg/l at 250,000 gpd and 0.2 mg/l at 500,000 gpd.

4. Given the absence of evidence of ownership, CWS does not have legal authority to enter the private property of the owner of Austin Pond, including the land adjacent to the spillway at Austin Pond, to perform water monitoring.

5. DEM acted without legal authority in attempting to require CWS to take daily downstream samples at the spillway and acted arbitrarily and capriciously in attempting to impose such a monitoring requirement.

### **RECOMMENDED DECISION**

It is recommended that the Respondent issue the Petitioner a NPDES permit to operate a surface discharge wastewater treatment plant at White Oak Subdivision in Johnston County with the following conditions:

- a. Stepwise increases, after issuance of Authorization to Construct, to allow effluent discharges of 250,000 gpd and 500,000 gpd. Total Phosphorus limitations will be 0.5 mg/l for the 250,000 gpd plant and 0.2 mg/l for the 500,000 gpd discharge. No other effluent limitations are at issue in this case. Monitoring requirements at the Spillway at Austin Pond shall be eliminated.
- b. Permit issuance is further subject to the stipulations of the parties.

**ORDER**

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

**NOTICE**

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Department of Environment, Health and Natural Resources.

This the 11th day of September, 1992.

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Thomas R. West  
Administrative Law Judge

STATE OF NORTH CAROLINA  
COUNTY OF WASHINGTON

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
92 EDC 0023

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MRS. S.<sup>1</sup> )  
Petitioner )  
 )  
vs. )  
 )  
WASHINGTON COUNTY BOARD )  
OF EDUCATION, )  
Respondent )

**FINAL DECISION**

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This contested case was heard in Greenville, Pitt County, North Carolina, on the 28th day of May, 1992 and continued by agreement of counsel to the 8th day of June, 1992. The hearing was concluded in Plymouth, Washington County, North Carolina, on the 9th and 10th days of June, 1992. The record closed with the filing of Proposed Findings and Conclusions of Law on July 10, 1992.

APPEARANCES

**For Petitioner:** Jack Hansel  
Pamlico Sound Legal Service  
Greenville, North Carolina

Roger Manus  
Carolina Legal Assistance  
Raleigh, North Carolina

**For Respondent:** Maynard Harrell  
Attorney At Law  
Plymouth, North Carolina

WITNESSES

**For Petitioner:** Raymond E. Webster  
(expert witness in fields of child psychology, school  
psychology, neuropsychology, and special education)  
Mrs. S.

**For Respondent:** Peggy Davenport  
Susan Styons  
Alta Allen  
Ileana Perez  
Darrell Bectle  
Randall Spier  
Katherine Pharr

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Pursuant to Petitioner's request made through counsel by pleading filed with the Office of Administrative Hearings (OAH) on July 17, 1992, the initials of this child and his parents will be utilized to protect their right to confidentiality.

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Jim Lloyd  
Sandra Rhodes  
Shirley Kuhn

**EXHIBITS**

**For Petitioner:** Petitioner's Exhibit #1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28

**For Respondent:** None

**ISSUES**

1. Whether the Washington County Board of Education has failed to provide G.E.S.\* with a free and appropriate education through an appropriate individualized education program pursuant to State and federal law.

2. Whether the Washington County Board of Education has denied G.E.S. his right to a free appropriate education by failing to provide him the necessary related services he requires to receive an appropriate education.

3. Whether or not G.E.S.'s individualized education plan is otherwise appropriate to meet his needs.

4. Whether or not G.E.S.'s individualized education plan is being implemented to meet his needs.

**STIPULATIONS**

The Stipulations are contained in the Prehearing Order and as further stipulated and defined in the record and are set out in this decision.

**FINDINGS OF FACT**

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes.

2. Mrs. S. (Petitioner) is a citizen and resident of Roper, Washington County, North Carolina and is the mother and responsible parent (along with her husband Mr. S.\* ) for their minor child.

3. G.E.S.'s date of birth is March 3, 1982, and he has completed grade level three at Pines Elementary School, Plymouth, Washington County, North Carolina.

4. G.E.S. has from birth suffered from a diffuse encephalopathy with bifrontal dysfunction associated with medical complications at delivery, apparently caused by subarachnoid hemorrhage.

5. Respondent is the local education agency responsible for providing a free, appropriate public education to G.E.S.

6. In a report prepared by Becky H. Taylor, Center Director for the Sylvan Learning Center, Greenville, North Carolina, in May of 1990, she concludes that G.E.S. tires easily and becomes quite frustrated in situations that are not tailored to meet his needs. This conclusion is adopted as a finding of fact and is quoted as follows:

**"He tires easily and becomes quite frustrated in situations that are not tailored to meet his needs."** (See Petitioner's Exhibit #15)

7. On or about August 14, 1990, G.E.S. was seen by Dr. Theodore R. Sunder, M. D., Associate Professor and Chief of Pediatric Neurology at East Carolina University. Dr. Sunder diagnosed G.E.S.'s medical condition as diffuse encephalopathy with bifrontal dysfunction. In his report of August 14, 1990, he concludes that G.E.S. will require behavioral therapy. Dr. Sunder's conclusion is adopted as a finding of fact. (Petitioner's Exhibit #3)

**"In addition, he will require behavioral therapy, likely by an organic psychologist with some experience in working with head injured individuals."**

8. Prior to G.E.S.'s transfer to the jurisdiction of the Respondent, Washington County Board of Education from the Martin County Board of Education in mid term of the second grade, G.E.S. was provided education pursuant to his IEP. He was designated EMH.

9. On or about January 4, 1991, G.E.S. was recommended by Respondent for placement in a special education program and to continue the designation in the EMH category. This designation was not objected to by Petitioner. (See Petitioner's #11)

10. During the second grade year G.E.S. began to manifest symptoms of headaches, upset stomach and behavior problems. Petitioner expressed her concerns to Mrs. Peggy Davenport, Exceptional Children's Director of the Respondent in her correspondence to her dated February 4, 1991. Specifically, her observations, which are taken as findings as to her assessment of G.E.S.'s symptoms are quoted as follows:

**"Apparently, his needs are not being met because there are obvious signs of frustration and low self esteem. G.E.S. is experiencing headaches, upset stomach and behavior problems not only at home but at school as well."** (See Petitioner's Exhibit #9)

11. In a separate letter to Mrs. Peggy Davenport under date of February 14, 1991, Petitioner objected to Respondent's refusal to approve an independent evaluation of G.E.S. and requested mediation. (See Petitioner's Exhibit #9)

12. Pursuant to a recommendation contained in Respondent's committee report dated February 12, 1991 (see Petitioner's Exhibit #9), a psychological evaluation was performed by Shirley P. Kuhn, MS, Psychological Associates, 400 W. 16th Street, Washington, North Carolina. Ms. Kuhn had in her possession Dr. Sunder's diagnosis and recommendations. Inasmuch as Ms. Kuhn refers to Dr. Sunder's diagnosis and recommendations, this reference is adopted as a finding that Ms. Kuhn was aware of Dr. Sunder's diagnosis and report. Ms. Kuhn, in her report to Respondent, writes:

**"His (Dr. Sunder) recommendations spanned the gambit of special services, including speech/language, physical, and occupational therapy as well as behavior therapy and management, all integrated into a highly structured academic program in a self-contained learning disabilities classroom setting."** (See Petitioner's Exhibit #13)

13. Notwithstanding the presence of the diagnosis found by Dr. Sunder and his recommendations, Ms. Kuhn rejected the recommendation of a further neuropsychological evaluation of G.E.S. or, for that matter, any plan to implement any other changes in G.E.S.'s IEP except for the administration of a WISC-R, which is a standard test to measure intelligence. Ms. Kuhn's recommendations are stated as follows:

**"In any case, fearing that clinical predictions for G.E.S. are fast becoming a self fulfilling prophecy, this examiner boldly suggests that his teachers approach him without any preconceptions as they try to determine for themselves what his learning pace can be. There is probably nothing more to be gained by further 'specialized' evaluations (at**

least not enough to outweigh what might be perceived as additional messages that something is wrong with him), but it will be very important in the next few months to clarify his rate of cognitive development." (See Petitioner's Exhibit #13) (emphasis added)

14. On or about June 4, 1991, at an IEP meeting, a recommendation was made that G.E.S. "receive a neuropsychological". (See Petitioner's Exhibit #7) As a result, Dr. Raymond F. Webster, PhD., NCSP, a recognized authority in the field of neuropsychology, performed a psychological evaluation. This psychological evaluation accepted Dr. Sunder's diagnosis of G.E.S. and some of the other of Dr. Sunder's observations. Dr. Webster administered a battery of diagnostic tests. Based upon the review of these diagnostic tests and interview with G.E.S. and the Petitioner, Dr. Webster made certain conclusions and outlined very specific recommendations based upon a multimodal teaching strategy. Dr. Webster recognized that G.E.S. was exhibiting certain stress related behaviors, not unlike what had been observed by Dr. Sunder in his report and Ms. Taylor in her report. Dr. Webster's findings as to the existence of these behaviors is adopted as a finding of fact and is quoted as follows:

**"G.E.S. was referred for a comprehensive neuropsychological evaluation by Ms. Peggy Davenport, Director of Exceptional Children's Program with the Washington County Schools. The referral was prompted by Mrs. S. because of increasing difficulties experienced by G.E.S. with school achievement and behavior at home following school attendance..."**

Emotionally, G.E.S. appears to be a highly distressed and intense youngster who approaches school with a good deal of fear and the expectation of failure. Insecurity, uncertainty, and feelings of being different from his peers in a negative way were suggested. High needs for emotional support and reassurance are evident. Impulse control and restraint are well below age-level expectancies and likely to be the result of both frontal lobe damage which is compounded by emotionally-based problems associated with organicity.

G.E.S. appears to take some of his emotional distress and convert it into corresponding physical symptoms. Frustration, anger, and loss of control behaviorally may be expected along with frequent physical or somatic complaints. Data obtained from both mother and G.E.S. during independent interviews confirms the findings from the projective testing data.

...Additionally individual counseling for him and parent effectiveness training and counseling for parents, especially mother, are appropriate and recommended...

**The counselors should be professional psychologists with specific expertise in working with youngsters who have these kinds of characteristics associated with organicity." (See Petitioner's Exhibit #12)**

15. Based upon the report of Dr. Webster, G.E.S.'s IEP for the school year 1991-92 was agreed upon. G.E.S. was recommended for a change in placement to SLD. The decision to change G.E.S.'s placement from EMH to SLD was based upon Dr. Webster's neuropsychological evaluation, the recommendation of Petitioner and the School Based Committee. (See Petitioner's Exhibit #5)

16. Also as contained in Petitioner's Exhibit #5 is an adoption of the parent effectiveness training recommendation of Dr. Webster and is quoted as follows:

**"Assist mother as recommended by the neuropsychological 6/20/91."**

17. The IEP evaluation notes low frustration tolerance and that G.E.S. works slowly, and he's easily frustrated. (See Petitioner's Exhibit #5)

18. Many of the recommendations of Dr. Webster were incorporated in G.E.S.'s IEP. In some instances, copies of his recommendations were attached as exhibits to the IEP (See Petitioner's Exhibit #28).

19. On or about September 17, 1991, G.E.S. was again seen by Dr. Theodore R. Sunder, Associate Professor, Chief, Pediatric Neurology at East Carolina University. G.E.S. was presented to Dr. Sunder in part to diagnose G.E.S.'s continuing symptoms of headaches. Dr. Sunder concludes and the undersigned finds as a fact that the headaches are a result of stress. Dr. Sunder's report is quoted as follows:

"I feel that these (headaches) are distinctly stress related. I don't find anything to suggest significant vascular component at this juncture. Again I would agree that supportive psychotherapy as outlined and recommended by the neuropsychologist would be important and certainly beneficial in optimizing this young man's performance in the school setting. This should be carried out at a frequency determined by the therapist but likely would require several times weekly at the beginning...." (See Petitioner's Exhibit #3)

20. On or about September 17, 1991, Sue H. Hilliard, licensed physical therapist, made certain recommendations concerning G.E.S.'s need for physical therapy and they are adopted as findings of fact:

"His problems of memory deficiency, frustration, and inattention are best served by small settings with decreased audio-verbal stimulus with allowances made for fatigue with fine motor deficiencies. Physical therapy should be integrated into his program to address his motor coordination and control deficits. The special physical education program initiated by you last year would not only meet the criteria established by his recent evaluation, but also addresses those problems specifically found with my evaluation." (See Petitioner's Exhibit #4)

21. On or about September 30, 1991, Theresa Dulski, OTR/L School of Medicine, Department of Pediatrics, East Carolina University, made recommendations rejecting the need for direct occupational therapy (OT) and this conclusion is made a finding of fact as follows:

"We both agreed that based on my clinical observation findings in which G.E.S. demonstrated good postural control, shoulder stability, muscle strength and good dynamic balance skills, direct occupational therapy services are not recommended." (See Petitioner's Exhibit #21)

22. On or about November 22, 1991, in correspondence addressed to Mr. Robert J. Alligood, Superintendent, Washington County Schools, attorneys representing G.E.S. and Mrs. S. made the following demand which is adopted as a finding of fact for purposes of formally stating Mrs. S.'s position concerning psychological counseling:

"It is clear that psychotherapy which G.E.S. needs will have to be provided by Dr. Webster or someone with similar expertise. No such psychologist can be found in Washington County. Therefore I and Roger Manus of Carolina Legal Assistance who is also representing Mrs. S. in this matter, felt that rather than scheduling another meeting we should formally advise you that it is absolutely necessary that psychotherapy as outlined and recommended by Dr. Webster be incorporated into G.E.S.'s individual education program at no cost to him or his parents. Also note that Dr. Sunder stated in his report that G.E.S. needed the therapy as recommended by Dr. Webster.

If this psychotherapy can be included in the program, then I believe any remaining issues can be resolved by agreement. However, if you do not agree to provide this psychotherapy then we wish to request the due process hearing through the Office of Administrative Hearings in regard to all issues relating to this individual education program. Since Mrs. S. is clear in her belief that G.E.S. must have this therapy and

since the psychologist and physician who have examined G.E.S. are also in agreement on this point, we see no need for further evaluation of G.E.S. or for any other further meeting or to discuss this point." (See Petitioner's Exhibit #1)

23. Notwithstanding the information disclosed to the Respondent in Petitioner's Exhibit #1 concerning Tideland Mental Health Center, a recommendation was made by Respondent on January 6, 1992, that in order to "assist Mrs. S. an appointment will be made for G.E.S. at Tideland."

24. On or about January 13, 1992, Mrs. S., as Petitioner, filed a petition for a contested case hearing in the Office of Administrative Hearings complaining of the following:

**"The agency has failed to provide my son with an adequate individualized program in that, among other things they have refused to provide the occupational therapy, physical therapy and psychological counseling necessary to his receiving a free appropriate education in the least restrictive environment."**

25. In the Prehearing Order received for filing on May 28, 1992, the following stipulation was entered into between counsel:

**"Dr. Webster's recommendations of June 20, 1991 are appropriate and should be implemented except that Respondent does not agree that the counselor(s) should be professional psychologists with specific expertise in working with youngsters who have the kinds of characteristics associated with organicity that G.E.S. has."**

26. By stipulation entered on record on June 8, 1992, Respondent stipulated that all 15 requests for admissions previously filed and dated March 13, 1992, were true and accurate except for the need for psychological counseling by an expert in organicity and the expertise for coordinating the services to G.E.S. and with the further limitation that the stipulation does not admit that these services are required by law. The requests for admissions are as follows:

**1. G.E.S. needs to spend at least half of his school day in a classroom with a small number of students and a teacher certified in the field of learning disabilities.**

**2. In any classroom situation where the teacher is not certified in the field of learning disabilities, but where writing or mathematics are involved, G.E.S. needs for the teacher to have active and direct consultation with learning disabilities specialist.**

**3. G.E.S. needs to have implemented the educational recommendations attached as exhibit 1 (exhibit 1 contains the recommendations copied directly from Dr. Webster's report.).**

**4. G.E.S. needs a brief respite period for every 20 minutes that he is involved in an academic situation.**

**5. G.E.S. needs adaptive physical education.**

**6. G.E.S. needs individual counseling by a professional psychologist with specific expertise concerning problems associated with organicity.**

**7. G.E.S. needs behavior therapy by a psychologist with specific expertise concerning problems associated with organicity.**

**8. G.E.S. needs for there to be coordination between the home and school concerning his behavior program.**

9. As a related educational service, G.E.S. needs parent effectiveness training and counseling for his parents.

10. For meaningful improvement in gross motor coordination and control, G.E.S. needs physical therapy at least once a week for one hour.

11. G.E.S. needs occupational therapy at least once a week for one hour for meaningful improvement of fine motor coordination and control.

12. G.E.S. needs speech and language therapy.

13. In order to not experience significant educational regression during the summer and thus have reasonable equal educational opportunity, G.E.S. needs educational services during the summer.

14. An appropriate education for G.E.S. requires that there be formal reviews by school system representatives with his parents every six weeks concerning the efficacy of his educational program.

15. G.E.S. needs a formal education reevaluation every six months."

27. G.E.S. spends a substantial portion of his day in a LD classroom and the remainder of his day in the regular classroom pursuant to the IEP. Ms. Styons is G.E.S.'s LD teacher and he is benefitting academically from the instruction being received by her. Ms. Styons employs a multimodal teaching strategy and has studied at East Carolina University under Dr. Webster.

28. A stipulation is contained in the record where counsel for Respondent and Petitioner agreed that Dr. Webster is not aware of the implementation of any of his recommendations contained in his report.

29. Ms. Styons, as the learning disabilities teacher in the areas as outlined in the IEP and other related areas, consults on a regular basis with Ms. Alta Allen, the regular classroom teacher.

30. Based upon the testimony of Respondent's witnesses, a substantial number of Dr. Webster's recommendations are being implemented in the classroom as well as being provided for in the IEP. Except as specifically found to the contrary herein, G.E.S.'s IEP, as well as the implementation of the IEP, reflect to a substantial degree the implementation of Dr. Webster's recommendations. Where the IEP or the implementation of the IEP does not reflect these recommendations, it is expressly found that they are either not necessarily appropriate or that G.E.S. will not benefit academically from their implementation or are otherwise unnecessary.

31. Based upon the testimony of Respondent's witnesses, and as provided for in his IEP or otherwise as implemented, sufficient respite periods are provided G.E.S. during the class day.

32. G.E.S. is provided, or it is implemented in his IEP, adaptive physical education. Randall Spier implements the IEP in the area of physical education and instructs G.E.S. in adaptive PE for periods of 30 minutes per week.

33. G.E.S. at home has been sick, throwing up with headaches, experiencing diarrhea, refusing to go to school, exhibiting aggressive behavior in the afternoons, chewing his bottom lip, biting his nails and exhibiting other related symptoms of stress. Mrs. S. has observed G.E.S. driving a lawn mower and golf cart as a means of reducing stress.

34. G.E.S.'s weekend behavior is much better than his school week behavior as it relates to stress.

35. Causality and nexus have been established between the exemplifying of stress related behavior at home and the fact that the behavior is generated as a result of school related environments.

36. A person with a closed head injury such as G.E.S.'s requires a somewhat different approach to services than does a person with mental retardation and the expectations overall would be higher for G.E.S. The remediation of G.E.S.'s skills deficits requires an approach which teaches him to compensate for or work around his neurological problems instead of trying to strengthen his abilities in all areas.

37. G.E.S.'s stress arises because of the natural negative feedback he gets at school as a result of his inability to do certain tasks because of his head injury. This negative feedback occurs even if the teacher is very warm and supportive.

38. Based upon the medical reports of Dr. Webster and Dr. Sunder and the expert testimony of Dr. Webster, G.E.S. is in need of behavior therapy and counseling concerning reduction of fatigue and stress by a psychologist with specific expertise concerning problems associated with organicity.

39. Based upon the medical report of Dr. Webster and by his expert testimony, G.E.S. is in need of coordination between the home and school concerning his behavior program. Mrs. Styons (or someone with her equivalent training and experience) in consultation with a psychologist with specific expertise concerning problems associated with organicity is sufficient for this coordination.

40. Based upon the medical records of Dr. Webster and the expert testimony of Dr. Webster, Mrs. S. and Mr. S. are in need of parent effectiveness training and counseling as this training and counseling pertain to the area of G.E.S.'s stress and fatigue symptoms experienced at home. This training and counseling to be effective must be received from a psychologist with specific training and expertise concerning the problems associated with organicity.

41. Individual counseling for G.E.S. by a professional psychologist with specific expertise concerning problems associated with organicity should be oriented toward teaching G.E.S. stress management techniques and cognitive control mechanisms. Such cognitive control mechanisms would help G.E.S. to recognize when he is getting fatigued and losing behavior control and give him alternative ways of dealing with his feelings and the overall negative impact of his self concept. The specialist in this area would set up a specific behavior management system for G.E.S.

42. G.E.S.'s IEP and the implementation of the IEP call for improvement in gross motor coordination and control. G.E.S. is receiving appropriate physical therapy in a small physical education class and as a consequence he is receiving this service (or minor adjustments may be made to ensure he receives it).

43. G.E.S.'s IEP and its implementation calls for speech and language therapy. Katherine Pharr provides speech clinician services and instructs G.E.S. in a small group setting with two other students and implements his IEP language therapy. She also consults with Ms. Styons on a regular basis.

44. The paucity of evidence concerning the resolution of the issue concerning educational services during the summer was insufficient to carry the burden of proof as to its benefit or necessity notwithstanding the stipulation to the contrary.

45. G.E.S. and his parents are presently receiving formal reviews and meetings with the School Based Committee and are otherwise receiving adequate notice of G.E.S.'s progress. There is no reason to depart from what G.E.S. is now receiving by way of review notwithstanding the stipulation to the contrary.

46. During the 1991-92 school year, G.E.S. had the benefit of competent and caring special education and regular classroom teachers. These teachers implemented most of the instructional curricular and behavioral recommendations which are a major part of the educational recommendations found at pp. 6-10 of the June 1991 evaluation report of Dr. Webster. (Petitioner's proposed findings of fact, pg. 5). Mrs. S.

agreed to this IEP in the instructional phase.

47. G.E.S. has been academically successful and maintained honor roll grades.

Based upon the foregoing Findings of Fact, the undersigned makes the following:

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over the person and subject matter of this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes.

2. As stated in G.S. 115C-106, it is the public policy of the State of North Carolina to ensure every child a fair and full opportunity to reach his full potential.

3. G.E.S. suffers from a diffuse encephalopathy with bifrontal dysfunction associated with medical complications at birth and likely caused by a subarachnoid hemorrhage. G.E.S. is experiencing rather diffuse and generalized cerebral and likely cerebellar inefficiency. G.E.S. requires a multifaceted treatment program involving both direct and consultative LD services at the Pines Elementary School, Washington County, Plymouth, North Carolina. As a consequence of G.E.S.'s disability, he is a child with "special needs" and entitled to special education and related services as defined in G.S. 115C-109. G.E.S. is also a child with a disability as defined in the Individuals With Disabilities Education Act, 20 USCA 1401, et seq.

4. G.E.S. is entitled to "special education" services as that term is defined in G.S. 115C-108.

5. G.E.S. is entitled to "related services" as that term is defined in G.S. 115C-108.

6. G.E.S. is entitled to a free appropriate education as a consequence of his being defined as a child with special needs as provided in G.S. 115C-111.

7. G.E.S. is entitled to the preparation and implementation of an individualized educational program (IEP) as defined in G.S. 115C-113(f) as a consequence of being defined as a child with special needs.

8. On or about August 14, 1990, Dr. Theodore R. Sunder, Associate Professor, Chief, Pediatric Neurology, East Carolina University, suggested behavioral therapy.

**"In addition he will require behavioral therapy, likely by an organic psychologist with some experience in working with head injured individuals."**

9. On or about January 4, 1991, Respondent classified G.E.S. as EMH. (Petitioner's Exhibit #11)

10. On or about February 4, 1991, Mrs. S., in correspondence to Mrs. Peggy Davenport expressed concern about her son's emotional needs:

**"Apparently, his needs are not being met because there are obvious signs of frustration and low self esteem. G.E.S. is experiencing headaches, upset stomach and behavior problems not only at home but at school as well."**

11. A psychological evaluation was performed by Shirley P. Kuhn, MS. Ms. Kuhn notes in her evaluation Dr. Sunder's diagnosis:

**"Including speech/language, physical, and occupational therapy, as well as behavior therapy and management, all integrated into a highly structured academic program in**

a self contained learning disabilities classroom setting."

However, Ms. Kuhn, in her recommendation states:

**"In any case, fearing that clinical predictions for G.E.S. are fast becoming a self fulfilling prophecy, this examiner boldly suggests that his teachers approach him without any preconceptions as they try to determine for themselves what his learning pace can be. There is probably nothing more to be gained by further 'specialized' evaluations (at least not enough to outweigh what might be perceived as additional messages that something is wrong with him), but it will be very important in the next few months to clarify his rate of cognitive development."** (emphasis added)

Her only recommendation was the administration of the WICS-R. No recommendation was made as to the correct designation of G.E.S. from the classification as EMH; no recommendation was made as to implementation of Dr. Sunder's diagnosis and recommendations as to behavior therapy. There was an express recommendation that no further psychological evaluation be made of G.E.S. as this would only undermine his self esteem and likely be a "self fulfilling prophecy." (Petitioner's Exhibit #13)

12. On or about June 4, 1991, at an IEP meeting, a recommendation was made that G.E.S. "receive a neuropsychological". (Petitioner's Exhibit #7) As a result, Dr. Raymond F. Webster, PhD., NCSP, a recognized authority in the field of neuropsychology, performed a psychological evaluation. This psychological evaluation accepted Dr. Sunder's medical diagnosis of G.E.S. and paralleled other of Dr. Sunder's recommendations. Dr. Webster administered a battery of diagnostic tests. Based upon those diagnostic tests, Dr. Webster outlined very specific recommendations based upon a multimodal teaching strategy. Again, Dr. Webster noted G.E.S.'s symptoms as reported by Mrs. S. concerning stress and behavior and also observed these in his testing of G.E.S.

**"Additionally, individual counseling for him and parent effectiveness training and counseling for parents, especially mother, are appropriate and recommended."** (Petitioner's Exhibit #12)

This was the second major recognition by a highly trained professional that stress related problems existed. Further, Mrs. S. had stated this fact to Respondent in her correspondence of February 4, 1991. (Petitioner's Exhibit #9)

13. G.E.S.'s School Based Committee, on or about September 5, 1991, reclassified G.E.S. as SLD which was a change in the previous classification.

**"The above decision was based on the following: neuropsychological, parent recommendation, SBC recommendation."**

It further states:

**"Assist mother as recommended by the neuropsychological 6/20/91."**

The IEP evaluation notes again low frustration tolerance and that he (G.E.S.) works slowly, he's easily frustrated. Many of the other recommendations of Dr. Webster were approved for implementation in the IEP. (Petitioner's Exhibit #5)

14. Again, G.E.S. was evaluated by Dr. Sunder on September 17, 1991. Dr. Sunder reports:

**"Unfortunately he had an association with his significant degree of stress, primarily manifested by late afternoon headaches."**

Dr. Sunder reports from the standpoint of his headaches:

"I feel that these are distinctly stress related. I don't find anything to suggest significant vascular component at this juncture. Again, I would agree with supportive psychotherapy as outlined and recommended by the neuropsychologists would be important and certainly beneficial in optimizing this young man's performance in the school setting. This should be carried out at a frequency determined by the therapist, but likely would require several times weekly at the beginning."

15. Between the time of the adoption of the IEP in September, 1992, and January 6, 1992, no related services were provided to G.E.S. or the Petitioner concerning stress as recommended by both Dr. Webster and Dr. Sunder.

16. A demand for those services was made by the Petitioner's attorneys on or about November 22, 1991. (Petitioner's Exhibit #1)

17. Notwithstanding the information disclosed to the Respondent in Petitioner's Exhibit #1 concerning Tideland Mental Health Center and the lack of anyone in that clinic with expertise in neuropsychology, a recommendation was made by Respondent on January 6, 1992, that in order to "assist Mrs. S. an appointment will be made for G.E.S. at Tideland."

18. Respondent does not deny the validity of the recommendations of Petitioner's experts, particularly Dr. Webster. Respondent's main issue concerning the recommendation was whether or not G.E.S. was legally entitled to the psychological services as a "related service" rendered by someone familiar with neuropsychology.

19. Based upon the expert testimony of Dr. Webster, his report (Petitioner's Exhibit #12) and Dr. Sunder's report (Petitioner's Exhibit #3), both professionals with impeccable credentials in their field of expertise and as accepted by the Respondent in stipulations, it cannot be denied that G.E.S. and Mrs. S. (as well as Mr. S.) are in need of and entitled to this counseling under applicable law. The question of the scope and magnitude of this counseling is the main issue at the heart of this contested case hearing.

20. Under the provisions of G.S. 115C-108, the term 'related services' means...counseling services... the term also includes...parent counseling and training and assisting parents in understanding the special needs of their child."

21. Related services have been judicially held to include speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services and medical services for diagnostic or evaluation purposes.

22. Section 1501(1) of the policy statement of the Department of Public Instruction defines 'related services' to include "(6) parent counseling and training means assisting parents in understanding the special needs of their child and providing parents with information about child development. (8) Psychological services include consulting with parents, teachers and other school personnel and planning program and services to meet the identified needs of children..." "Planning and managing a program of psychological services including psychological counseling for children and parents."

23. Respondent is charged with the statutory duty of providing G.E.S. with related services if Petitioner has established by the greater weight of the evidence that G.E.S.'s special education will benefit. There has been established a sufficient causative relationship between the symptoms exhibited by G.E.S. at home (headaches, nausea, diarrhea, etc.) and stress related to his educational environment. It is specifically concluded that Respondent is charged with the statutory duty to provide G.E.S. with related services if Petitioner has established through stipulation and by the greater weight of the evidence that these services will benefit G.E.S.'s special education and give to him an opportunity to achieve his full potential commensurate with that given other children. G.E.S. is entitled to the services of a licensed psychologist who has expertise in organicity in order to provide psychological counseling to G.E.S. and Mrs. S. (and Mr. S.) at a frequency to be determined by the therapist. This therapy and counseling should be limited to therapy related to coping

with and eliminating (to the extent possible) these symptoms because of their direct relationship to causative variables attributed to G.E.S.'s school environment. Although G.E.S. may benefit from other psychotherapy relating to his disability, no causative evidence has been produced which would link this need to his educational environment. No other legally sufficient rationale can be made, based upon the Findings of Fact, for the undersigned to conclude that any and all psychological therapy is required to be provided to G.E.S. or his parents by Respondent.

24. The psychological services as specified above are "related services" under the term "special education" and are to be provided to G.E.S. and his parents at no cost to them.

25. Based upon the testimony of the other witnesses who are familiar with G.E.S., particularly his teachers, the remainder of G.E.S.'s IEP is appropriate and substantially incorporates the recommendations of Dr. Sunder and Dr. Webster and are being commendably provided to G.E.S.<sup>2</sup>

26. Based upon the report of Theresa Dulski (Petitioner's Exhibit #2) it is recommended that OT therapy services to improve fine motor dexterity skills not be provided to G.E.S.

27. The IEP was appropriately implemented to meet G.E.S.'s needs.

28. Except as indicated herein no other omission or failure was found to justify a remedy to the Petitioner.

29. Based upon the testimony of Respondent's witnesses and the Petitioner, the remainder of G.E.S.'s IEP provides G.E.S. with a free and appropriate education through an appropriate individualized education program pursuant to State and federal law and has not otherwise denied G.E.S. his right to a free appropriate education by failing to provide him the necessary related services; G.E.S.'s individualized education plan is appropriate and is being implemented to meet his needs. In fact, as evidenced by the testimony of Respondent's witnesses and the Petitioner (and further Petitioner's own Proposed Finding of Fact), G.E.S.'s IEP is being commendably implemented.

30. G.E.S. spends a substantial portion of his day in a LD classroom and the remaining portion of his day in a regular classroom. Ms. Styons is G.E.S.'s LD teacher and he is benefitting academically from the instruction being received by her. Ms. Styons employs a multimodal teaching strategy and has studied at East Carolina University under Dr. Webster.

31. Ms. Styons, as the learning disabilities teacher in the areas as outlined in the IEP and in other related areas, consults on a regular basis with Ms. Alta Allen, the regular classroom teacher.

32. Based upon the testimony of Respondent's witnesses and as provided for in his IEP or otherwise implemented, sufficient respite periods are provided to G.E.S. during the class day.

33. G.E.S. is provided for or it is implemented in his IEP, adaptive physical education. Randall Spier implements the IEP in the area of physical education and instructs G.E.S. in adaptive PE for periods of 30 minutes per week.

34. G.E.S.'s IEP and the implementation of the IEP call for improvement in gross motor coordination and control. G.E.S. is receiving appropriate physical therapy in a small physical education class and, as a consequence, he is receiving this service.

35. G.E.S.'s IEP and its implementation call for speech and language therapy and he is receiving

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<sup>2</sup>Particularly it was observed by the undersigned that Mrs. Styons was providing services to G.E.S. in a highly significant way. This could also be said of the many other fine teachers and personnel associated with G.E.S.'s IEP and its implementation.

the appropriate services in this area.

36. The paucity of evidence concerning the resolution of the issue concerning educational services during the summer was insufficient notwithstanding the stipulations of record. The undersigned finds that no conclusion may be made as to the educational services during the summer as meeting the legal standards for related services or as required by law.

37. G.E.S. and his parents are presently receiving formal reviews in meetings with the School Based Committee and are otherwise receiving adequate notice of G.E.S.'s progress. Therefore it cannot be concluded that this service is in any way inadequate as presently provided.

38. Based upon the medical report of Dr. Webster and by his expert testimony, G.E.S. is in the need of coordination between the home and school concerning his behavior program. Mrs. Styons (or someone with her equivalent training and experience) in consultation with a psychologist with specific expertise concerning problems associated with organicity is sufficient for this coordination.

39. Physical therapy should be integrated into his program to address his motor coordination and control deficits. The special physical education program devised in his IEP is sufficient and meets the requirements of law.

40. Based upon the report of Theresa Dulski and what is otherwise required by law, direct occupational therapy services are not to be implemented.

41. G.E.S.'s need for formal education reevaluation and formal reviews by school system representatives with G.E.S.'s parents should be no more or less than the maximum required by law unless otherwise indicated in the IEP.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

**DECISION**

1. Respondent is charged with the statutory duty to provide G.E.S. with related services in order to give G.E.S. an opportunity to achieve his full potential commensurate with that given other children.

2. G.E.S. is entitled to the services of a licensed psychologist who has expertise in organicity in order to provide psychological counseling to G.E.S. and Mrs. S. (and Mr. S.) at a frequency to be determined by the therapist. This therapy and counseling should be limited to therapy related to coping with and eliminating (to the extent possible) those symptoms related to stress created from the classroom environment. Since these psychological services as specified are "related services" under the term "special education" they are to be provided to G.E.S. and his parents at no cost to them.

3. There shall be implemented a behavior program between school and home for G.E.S. Mrs. Styons (or someone with her equivalent training and experience) in consultation with a psychologist with specific expertise concerning problems associated with organicity is sufficient for directing this coordination.

4. Except as herein ordered, Petitioner is not entitled to any other relief concerning the educational services provided to G.E.S.

5. This cause is retained for further orders as may be necessary.

**NOTICE**

In order to appeal this Decision, the person seeking review must file a written notice of appeal with

the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Decision. G.S. 115C-116(h) and (i).

This the 28th day of August, 1992.

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Julian Mann, III  
Chief Administrative Law Judge

**T**he North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.

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